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No. 04-

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Individuals with Disabilities Education Act (the "IDEA")'s attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), authorize a court to award "expert" fees to the parents of a child with a disability who is a prevailing party under the IDEA?

II. Did the Circuit Court err in affirming the district court's partial award to the prevailing parents pursuant to the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), for the services of an "educational consultant"?

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OPINIONS ENTERED IN THIS CASE

The initial opinion of the United States Court of Appeals for the Second Circuit was rendered on March 29, 2005. The opinion was amended on April 15, 2005 and is officially reported at *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005). (App. A). The United States Court of Appeals for the Second Circuit affirmed a July 22, 2003 Memorandum Opinion and Order of the United States District Court for the Southern District of New York, unofficially reported as *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294 (CSH), 2003 WL 21694398 (S.D.N.Y. July 22, 2003). (App. B).

STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgement on March 29, 2005. An Amended Judgment was entered on April 15, 2005. No petition for rehearing was filed in this case. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS MATTER

The focus of this matter turns on the interpretation and application of the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B).

Title 42 United States Code, Section 1415(i)(3)(B).

Award of attorneys' fees.

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

STATEMENT OF THE CASE

I. Statement of Facts

The Arlington Central School District ("District") is a public school district duly organized, existing and operating consistent with the Education Law of the State of New York. *See* N.Y. Educ. Law § 1804 (McKinney Supp. 2005). Under the IDEA, the District is a "local educational agency," *see* 20 U.S.C. § 1401(15)(A), responsible for the identification and evaluation of children with disabilities residing within its territorial boundaries, *see* 20 U.S.C. § 1412(a)(3)(A).

The IDEA aims "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Once identified, the District is responsible to provide resident children with disabilities between the ages of 3 and 21 with a "free appropriate public education." *See* 20 U.S.C. § 1412(a)(1)(A). A free appropriate public education is crafted through the collaboration of the disabled child's parents, teachers, and school district administrators and is recorded in an individualized education program ("IEP"). *See* 20 U.S.C. § 1414(d). The IEP is, in brief, a comprehensive statement of the educational needs of a disabled child and the specially designed instruction and related services to be employed to meet those needs. *See* 20 U.S.C. § 1401(11). In New York State, the IEP is produced by a Committee on Special Education (the "CSE"), whose members are appointed by the board of education or trustees of the school district. *See* N.Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005).

To achieve its goals, "[t]he IDEA requires that states [that receive certain federal funds] offer parents of a disabled student an array of procedural safeguards designed to help

ensure the education of their child." *Polera v. Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 482 (2d Cir. 2002). Under the IDEA, a parent may "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). "[T]he parents involved in such complaint shall have an opportunity for an impartial due process hearing," 20 U.S.C. § 1415(f)(1), which, under applicable provisions of New York State law, is conducted by a hearing officer appointed by the local board of education, *see* N.Y. Educ. Law § 4404(1) (McKinney Supp. 2005).

The underlying claim from which this petition stems was for tuition reimbursement for the unilateral placement of Joseph Murphy by his parents during the 1998/99 and 1999/00 school years in a private institution that services disabled students exclusively. Joseph's parents unilaterally enrolled him in the Kildonan School in Amenia, New York ("Kildonan") prior to a scheduled meeting of the CSE held on July 30, 1998. Kildonan has not been approved by the New York State Education Department ("NYSED") to instruct student with disabilities.[1] By letter dated September

1. The IDEA requires that each publicly placed student receive special education services which meet the standards of the NYSED. *See* 20 U.S.C. § 1412(a)(11)(A)(ii)(II). Private schools which wish to accept publicly placed students must comply with various regulations of the NYSED. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8(A-2), §§ 200.4, 200.7, 200.9, 200.15 (2004). Boards of education in New York have no authority to contract for the placement of a child with a disability in a private school which has not been approved by the NYSED to instruct students with disabilities. *See* N.Y. Educ. Law § 4402(2)(b)(2) (McKinney Supp. 2005). Kildonan is not on the State's list of approved private schools because it does not provide instruction consistent with the academic standards for content and rigor of this State, which is one component of a free appropriate public education. *See* 20 U.S.C. § 1401(8).

3, 1998, the parents requested an impartial hearing to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement of Joseph at Kildonan along with costs associated with private speech/ language therapy secured by them at their own expense during the 1997/98 school year.

Generally, "no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a). The IDEA provides that a local school district is not required to pay for the cost of education of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. *See* 20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.403.

The IDEA does not require school districts to pay for tuition at private schools except under limited circumstances. *See Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). When parents unilaterally withdraw their child from the public school and seek tuition reimbursement for their private placement, they do so at their own peril, having no guarantee that they will win. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-74 (1985).

Reimbursement is warranted only where, after a hearing, it is determined that the services offered by the school district are inadequate or inappropriate, the services selected by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(c). This legal analysis is structured to serve the public interest that public funds not be spent to support inappropriate private placements. *See* 64 Fed. Reg. 12,602 (Mar. 12, 1999) (discussion of comments to 34 C.F.R. § 300.403(c)).

Following the parents' hearing request, the District appointed Leonard W. Krouner from the State's list of certified hearing officers to serve as the impartial hearing officer ("IHO") in this matter. The parents were assisted during the hearing by Ms. Marilyn Arons, who described herself throughout the hearing as a "non-lawyer representative." At the hearing, Ms. Arons performed, without a license to practice law, many functions traditionally attributed to licensed attorneys. She made an opening statement, she conducted direct and cross examination of witnesses, she made a motion for a directed verdict, she raised objections and she prepared a post-hearing memorandum of law. After a lengthy hearing, the IHO determined that the District had not afforded Joseph a free appropriate public education, held that the parents appropriately placed him at Kildonan, and awarded the parents reimbursement for Kildonan's tuition and private speech/language therapy secured by them at their own expense during the 1997/98 school year.[2]

With respect to due process hearings, the IDEA permits each state to determine whether it will provide a single-tier or two-tier administrative review process. *See* 20 U.S.C. § 1415(g). New York has opted for the two-tier approach. *See* N.Y. Educ. Law § 4404 (McKinney Supp. 2005); *accord Heldman v. Sobol*, 962 F.2d 148, 152 (2d Cir. 1992). A party

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2. While the district court could "discern [no] legitimate objective of advocacy," *see Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398 at *1 n.1 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332 (2d Cir. 2005), in directing the district court's attention to the fact that since his service in this matter, Mr. Krouner was sentenced to six months in prison after pleading guilty in Albany County (NY) to multiple charges of fraud and has surrendered his law license, the District's notice was simply to illustrate that attorneys, unlike non-lawyer representatives, lay advocates and educational consultants, are subject to professional rules of conduct and are open to negative consequences for failing to abide by those rules.

dissatisfied with a decision of the hearing officer has the right to appeal the hearing officer's decision to a SRO. *See* N.Y. Educ. Law § 4404(2) (McKinney Supp. 2005). After these administrative remedies have been exhausted, a party may bring a special proceeding in state court or a federal action under Section 1415(i)(2) of the IDEA. *See* 20 U.S.C. § 1415(i)(2)(A); N.Y. Educ. Law § 4404(3) (McKinney Supp. 2005).

By petition dated August 17, 1999, the District sought review of the IHO's determination by the State Review Officer of the New York State Education Department (the "SRO") as provided by the New York Education Law. *See* N.Y. Educ. Law § 4404(2) (McKinney Supp. 2005). Rather than answer the allegations made in the District's petition, the parents filed *pro se* an action for injunctive relief on August 6, 1999 in the District Court for the Northern District of New York. The Honorable Thomas J. McAvoy, in a decision dated August 12, 1999, transferred the matter, pursuant to 28 U.S.C. § 1406(a), to the District Court for the Southern District of New York because the parents' claims arose, and all the parties reside in, the southern district. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 1258, slip op. at 2 (N.D.N.Y. Aug. 12, 1999).

Following the transfer to the southern district, the case was assigned to the Honorable Charles S. Haight, Jr. Judge Haight's chambers called the District's counsel to disclose that Judge Haight was the parent of a disabled student and had sued his public school district in the past over his child's education. To avoid even the appearance of impropriety, Judge Haight referred the matter to Magistrate Judge Frank Maas. After a pretrial conference on September 8, 1999, Magistrate Judge Maas recommended that the parents' case be dismissed for lack of subject matter jurisdiction. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, slip op. at 4-5 (S.D.N.Y. Sept. 21, 1999).

After the receipt of the parents' objections to Magistrate Judge Maas' report, the district court raised several questions, *sua sponte*, as to the timeliness and integrity of the administrative remedies in this matter and ordered the District to explain the relative merits of its administrative appeal through a series of judicial interrogatories. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 1999 WL 980164, at *4-6 (S.D.N.Y. Oct. 28, 1999). The Court did not, *sua sponte*, join the NYSED as a necessary party, pursuant to Fed. R. Civ. P. 19, but instead, granted the NYSED leave to submit a brief *amicus curiae* if so advised. The District advised the NYSED of the action, but it declined to appear. Notwithstanding this declination, the District and the NYSED have never been united in interest for purposes of these proceedings.

After reviewing the parties' responses to its interrogatories, the district court acknowledged that the District had timely filed its administrative appeal, but continued to reserve its decision on Magistrate Judge Maas' Report. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 1999 WL 1140872, at *3-4 (S.D.N.Y. Dec. 10, 1999). Stating that the SRO's delay in rendering a decision "cannot be tolerated," the district court retained jurisdiction over the matter and warned that it "will [not] hesitate to adjudicate plaintiffs' claims for equitable relief if the SRO fails to reach a final decision by December 20, 1999." *See id.* at *4.[3]

Against this backdrop, on December 14, 1999, the SRO sustained the IHO's determination to award the parents tuition

3. Since the district court's decision, the United States District Court for the Eastern District of New York has ruled in a class action that the SRO's consistent failure to render decisions in a timely manner violates federal law and has ordered a monitor to oversee the SRO's handling of challenges to special education programs. *See Schmelzer v. State of New York*, 363 F. Supp. 2d 453, 460-61 (E.D.N.Y. 2003).

reimbursement for their unilateral placement of Joseph in Kildonan for the 1998/99 school year. *See Application of the Bd. of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (SRO Dec. 14, 1999). The SRO, however, reversed the IHO's decision to reimburse the parents for private speech/language therapy secured by them at their own expense during the 1997/98 school year. *See id.*

Upon learning through status reports submitted by the parties that the SRO had filed a decision and order in the matter, the district court dismissed, as moot, the parents' complaint. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2000 WL 10255, at *1-2 (S.D.N.Y. Jan. 5, 2000). In so doing, the district court expressly declined the parents' request that it issue a declaratory ruling "'regarding whether pendency occurs at the IHO or the SRO level.'" *See id.* at *1.

In a Memorandum and Order of January 13, 2000, the district court reiterated its dismissal of the parents' action and its refusal to decide those issues "not presently before the court." *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2000 WL 28260, at *1 (S.D.N.Y. Jan. 13, 2000).

Subsequent to the district court's orders of January 5th and January 13th, the *pro se* parents filed what they termed a "motion to compel," seeking not only reimbursement for their unilateral private placement of their son during the 1998/99 school year, but also payment for their son's private placement during the 1999/00 school year. The district court, *sua sponte*, converted the parents' "motion" into an *ex parte* application for an order to show cause. The district court explained this reversal of position as "according plaintiffs' papers the lenity traditionally extended to *pro se* pleadings."

After reviewing submissions by the parties made in response to a second set of judicial interrogatories, the district court issued a Memorandum Opinion and Order on March 1, 2000. In its opinion, the district court interpreted the relevant statutory and regulatory framework to find that the student's "stay-put" or pendency placement was, for all times relevant to the complaint, the private school he attended during the 1998/99 school year. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 360 (S.D.N.Y. 2000). The Court of Appeals for the Second Circuit affirmed the district court's judgement in the parents' favor. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002).

On or about July 30, 2002, the parents supplied the Circuit Court with a itemized and verified bill of costs pursuant to Rule 39(c) of the Federal Rules of Appellate Procedure (including a consultation fee claim of $500 for Ms. Arons and $5,000 in attorneys' fees), for which they sought reimbursement by the District. In an Order filed on September 10, 2002, the Circuit Court disallowed the parents itemized and verified bill of costs.

By letters dated January and February 2003, the parents requested that the district court order the District to pay fees and costs incurred during the course of the federal litigation and state administrative proceedings. Included among the parents' expenses were $29,350 in fees pertaining to the services of Ms. Arons. In March 2003, the District opposed the parents' application for Ms. Arons' fees.

By Memorandum Opinion and Order, dated July 22, 2003, the district court granted the parents' application in part, and denied it in part. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398 (S.D.N.Y. July 22, 2003).[4] The district court found that the IDEA provides that

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4. Although the district court concluded that the parents could proceed *pro se* in their effort to collect Ms. Arons' fees and costs, *see Murphy*, 2003 WL 367872 at *1 n.3, contrary to the clear

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a district court, in its discretion, may award a party who is a "prevailing party" "reasonable attorneys' fees" and that, at impartial due process hearings, a party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." *See Murphy*, 2003 WL 21694398 at *4 (*citing* 20 U.S.C. § 1415(d)(1) and (e)(4)(B)). The district court held that unlicensed individuals such as Ms. Arons cannot collect "attorneys' fees" for doing work similar to that of an attorney, but instead, can collect for related work as "expert consulting services." *See id.* at *4.

Rather than conduct an analysis of Ms. Arons' alleged expertise, the district court stated that it was "in general agreement" with the district courts in *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97 Civ. 6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) and *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) that Ms. Arons is an expert and that, insofar as the parents' claim for Ms. Arons' fees was allowable, it was "subject to substantial discount." *See Murphy*, 2003 WL 21694398 at *8. The district court found that Ms. Arons' December 20, 2002 and March 18, 2003 "certifications" of services allegedly rendered were sufficient records of the time she spent on the matter, notwithstanding the fact that Ms. Arons kept no contemporaneous time records.

The district court then determined that Ms. Arons' fees for consulting serves were compensable from the time the parents requested an impartial hearing on September 3, 1998,

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precedent of the Second Circuit, *see Murphy*, 297 F.3d at 201; *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-25 (2d Cir. 1998), one federal court, applying similar precedent, recently held that parents may **not** proceed *pro se* when seeking reimbursement of consultant's fees and expenses as an IDEA prevailing party, *see Hayes v. Board of Educ. for the Cape Henlopen Sch. Dist.*, No. 02 Civ. 55, 2003 WL 105482, at *2 (D. Del. Jan. 3, 2003) (*applying Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231-32 (3d Cir. 1998)).

until the parents became "prevailing parties" under the IDEA on March 1, 2000, the date of the district court's ruling in their favor. *See id.* at *9.

The district court considered which of Ms. Arons' services, within the above-described temporal parameters, were compensable under the IDEA based on the standards set forth in *Palmyra* and *Connors*. *See Murphy*, 2003 WL 21694398 at *9-*10. The district court conducted no independent inquiry of a "market rate" for Ms. Arons' services. Instead, the district court relied solely on the *Palmyra* court's finding that the market rate for Ms. Arons' services is $200 per hour. *See Murphy*, 2003 WL 21694398 at *10. The district court determined that the parents' claims for mileage costs due to Ms. Arons' lack of a driver's license were not compensable. *See id.* at *11. Because the parents had not yet paid Ms. Arons, the district court ruled that an award of pre-judgement interest was not warranted. *See id.* The district court concluded that the parents were entitled to recover $8,650 for Ms. Arons' fees from the District. *See id.*

On August 20, 2003, the District timely filed a notice of appeal from the district court's July 22, 2003 Memorandum Opinion and Order.

II. The Decision of the United States Court of Appeals for the Second Circuit

The Circuit Court affirmed the district court's judgement that a prevailing parent may recover expert fees as costs under the IDEA's attorneys' fees shifting provision. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 (2d Cir. 2005). The Circuit Court concluded that dicta contained in the Supreme Court's opinion in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991), congressional inaction following *Casey*, and the legislative history of the IDEA, allowed it to construe the IDEA as providing for the reimbursement of Ms. Arons' fees as costs.

The Circuit Court's analysis correctly began with the recognition that "'costs' is a term of art that generally does not include expert fees in civil rights fee-shifting statute." *See Murphy*, 402 F.3d at 336. The Circuit Court also stated that it "appreciate[s] - and in practice honor[s], wherever possible - the virtues of relying solely on statutory text," *see Murphy*, 402 F.3d at 336, as instructed by the Supreme Court in *Casey*. In construing the fee-shifting provisions of several civil rights statutes, the Supreme Court held in *Casey* that while a prevailing party could recover "a reasonable attorney's fee as part of the costs" in civil rights actions, *see Casey*, 499 U.S. at 85 n.1 (*quoting* 42 U.S.C. § 1988), a prevailing party could not recover "expert fees" under 42 U.S.C. § 1988, *see id.* at 87, because there was no "explicit statutory authority" indicating that Congress intended for that sort of fee-shifting, *see id.* at 97.

The Second Circuit also acknowledged that

> two sister circuits, focusing exclusively on the text [of the IDEA's attorneys' fees provision], have recently concluded that . . . it 'does not specifically authorize an award of costs or define what items are recoverable as costs,' and that absent a specific authorization for the allowance of expert witness fees, 'federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.'

See Murphy, 402 F.3d at 336 (*quoting Neosho R-V Sch. Dist v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003)); *see also T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003).

The Circuit Court, however, felt it could depart from the wording of the statute because the Supreme Court in *Casey* "observed, in dicta, that a Conference Committee Report on the IDEA stated that '[t]he conferees intend that the term attorneys' fees as part of the costs include reasonable expenses and fees of expert witnesses and the reasonable

costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.'" *See Murphy*, 402 F.3d at 336-337 (*quoting Casey*, 499 U.S. at 91). To the Circuit Court, it was probative that the Supreme Court in *Casey* observed that "the statement [of the conferees] is an apparent effort to depart from ordinary meaning and to define a term of art." *See id.* The Circuit Court also found "it instructive that shortly after the [Supreme] Court's decision in *Casey*, Congress amended § 1988 in order to make expert fees compensable in civil rights actions, but Congress took no similar action with respect to the IDEA." *See Murphy*, 402 F.3d at 337.

Lastly, the Circuit Court concluded that it was not an abuse of discretion by the district court to award Ms. Arons a portion of her claimed fees in the absence of contemporaneous time record because "while attorneys must document an application for fees with contemporaneous time records, *see New York State Ass'n for Retarded Children, Inc. v. Casey*, 711 F.2d 1136, 1147-1148 (2d Cir. 1983), no such rule exists for experts or consultants." *See Murphy*, 402 F.3d at 339. The Circuit Court did hold prospectively, however, "that a plaintiff's application for fees for experts or consultants who perform services in IDEA actions will normally not be approved unless application is accompanied by time records contemporaneously maintained by the person performing the services." *See id.*

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erred in holding that the IDEA's attorneys' fees shifting provision authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA.

Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. *See Casey*, 499 U.S. at 98-99 (interpreting nearly identical language in the former version of 42 U.S.C. § 1988 not to include expert fees), *superseded by statute*, 42 U.S.C. § 1988(c) (2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (finding no authorization in IDEA for expert witness fees); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003) (finding nothing in the plain language of IDEA authorizes recovery of expert witness fees); *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 9 (D.D.C. May 26, 2004) (holding that the IDEA does not permit recovery of expert witness fees beyond the amounts provided in 28 U.S.C. § 1821(b)), *reh'g denied*, slip op. at 8 (D.D.C. July 21, 2004) (same); *Mayo v. Booker*, 56 F. Supp. 2d 597, 599 (1999) (holding that expert witness fees not available under IDEA); *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 659 (D.N.C. 1998) (determining that Section 1415 "does not provide for an award of expert witness fees"); *Shanahan v. Board of Educ. of the Jamesville - DeWitt Sch. Dist.*, 953 F. Supp. 440, 446 n.9 (N.D.N.Y. 1997) (holding that the IDEA provided no authority to courts to award expert fees as part of attorneys' fees and costs); *Cynthia K. v. Board of Educ. of Lincoln-Way High Sch. Dist.*, No. 95 Civ. 7172, 1996 WL 164381 at *2 (N.D. Ill. Apr. 1, 1996) (finding that expert fees "are simply not recoverable" under the IDEA).

The holding of the Second Circuit in *Murphy*, that a prevailing parent may recover expert fees as costs under the

IDEA's attorneys' fees shifting provision, *see Murphy*, 402 F.3d at 333, is in direct conflict with the holdings of the Eighth and Seventh Circuits, that expert fees are not recoverable under the IDEA given the absence of explicit statutory authorization for the shifting of the cost of expert fees onto the losing party, *see Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003).

To avoid certain confusion, not only in the Second Circuit, but throughout the Circuits, the Court must clarify for civil rights litigants in IDEA actions whether or not the Court intended for its opinion in *Casey* to elevate some of the IDEA's legislative history over the explicit wording of the statute and permit recovery of expert fees in IDEA actions. Where, as here, the IDEA is read to permit recovery of non-testimonial experts assisting parents in impartial due process hearings without the guidance of a licensed attorney, the effect is to reward, and provide future incentive for, the unauthorized practice of law.

A. The IDEA contains no explicit statutory authority for the recovery of expert fees.

"Fee-shifting provisions in federal statutes are not uncommon — 'numerous federal statutes allow courts to award attorney's fees.'" *A.R. v. New York City Dept. of Educ.*, 407 F.3d 65, 73-74 (2d Cir. 2005) (*quoting Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 600 (2001)). The IDEA grants courts discretionary power to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). "This language assumes, by its construction, that costs include something more than attorneys' fees but the IDEA does not specifically authorize an award of costs or define what items are recoverable as costs." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003) (internal quotation omitted).

"'Costs' is a term of art that generally does not include expert fees in civil rights fee-shifting statute." *Murphy*, 402 F.3d at 336. "Absent a specific definition of costs, [courts] look to the general provisions providing for the taxation of costs in federal courts as a matter of course." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003). "Title 28 U.S.C. § 1920(3) provides for payment of witness fees, and 28 U.S.C. § 1821(b) limits that payment to a $40 per day attendance fee." *See id.* "These sections, read together, permit district courts to tax certain fees as costs against the non-prevailing party." *See Brillon v. Klein Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 871-872 (S.D. Tex. 2003), *aff'd in part & rev'd in part*, 100 Fed. Appx. 309 (5th Cir. 2004). "They do not provide for an additional tax for expert fees." *See id.*

The Supreme Court has held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). There is "no authority to support the counter-intuitive assertion that the term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the costs statutes that apply to ordinary litigation." *Casey*, 499 U.S. at 87 n.3, *superseded by statute*, 42 U.S.C. § 1988(c) (2003). There is not doubt that Congress knows how to specify a shifting of expert witness fees. *See id.* at 88-89 (noting that "at least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees and expert witness fees"), *superseded by statute*, 42 U.S.C. § 1988(c) (2003) (providing explicitly for an award of expert witness fees).

The Circuit Court's first, and primary, error was its failure to look to the IDEA's fee-shifting provision to determine if

it contains "explicit statutory authority" for shifting of expert witness fees. As cited above, the IDEA's fee provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorney's fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. § 1415(i)(3)(B) (emphasis added).

Had the Circuit Court first completed the necessary inquiry as to whether or not the IDEA provides "explicit statutory authority" for recovery of expert witness fees, it could not have rationally concluded *other* than that the IDEA does not explicitly authorize the recovery of expert witness fees beyond the amounts provided in 28 U.S.C. § 1821(b). *See T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 481-482 (7th Cir. 2003); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031-33 (8th Cir. 2003); *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 8 (D.D.C. May 26, 2004).

B. *Casey* does not endorse an elevation of legislative history over the absence of explicit statutory authority for the recovery of expert fees under the IDEA.

The Circuit Court erred in construing dicta in *Casey*, which commented on some of the legislative history behind the IDEA's attorneys fees provision, *see Casey*, 499 U.S. at 91 n.5, as authority to depart from the text of the statute and conclude that Congress intended to allow prevailing parties to recover the costs of experts, *see Murphy*, 402 F.3d at 337; *see also Brillion v. Klein Indep. Sch. Dist.*, 274 F. Supp. 864, 872 (S.D. Tex. 2003) (similarly reading *Casey* as authorizing courts to depart from the text of IDEA's attorneys' fees provision based on legislative history), *aff'd in part & rev'd in part*, 100 Fed. Appx. 309 (5th Cir. 2004). "*Casey* in no

way endorsed the proposition that attorneys' fees include expert fees under the IDEA or that the legislative history of the IDEA is even relevant to the consideration of whether expert fees are recoverable under the IDEA." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004).

In *Casey*, the Supreme Court considered whether the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, gave authority to shift expert fees. *See Casey*, 499 U.S. at 84. This former version of Section 1988 contained a fee-shifting provision, almost identical to that in the IDEA (then named the Handicapped Children's Protection Act), allowing "the prevailing party . . . a reasonable attorney's fee as part of costs." *See* 42 U.S.C. § 1988(b), *amended by* 42 U.S.C. § 1988(c) (2003). The *Casey* Court held that this language was not an explicit statutory authorization that allowed shifting of expert witness fees. *See Casey*, 499 U.S. at 102.

In response to an argument that the legislative history of the IDEA provided an indication that Congress intended to include expert fees in "attorneys' fees as part of costs" under Section 1988, the Court observed, in a footnote, that a Conference Committee Report on the IDEA stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *See id.* at 91 n.5 (*quoting* H.R. Conf. Rep. No. 99-687 at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1808). The Court, in dicta, characterized this portion of the IDEA's legislative history as "an apparent effort to depart from ordinary meaning and to define a term of art," noting that "the specification would have been quite unnecessary if the ordinary meaning of the term included those elements." *See id.*

According to the Circuit Court, this dicta compelled it to conclude that the IDEA's attorneys' fees provision includes expert witness fees. *See Murphy*, 402 F.3d at 337. However, "this 'apparent effort' to define a term of art in legislative history . . . is not the kind of 'explicit statutory' authorization the Supreme Court said in *Crawford* was necessary to exceed the limitations of the general costs statutes." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003). In *Casey*, the Supreme Court merely referenced the legislative history of the IDEA as an example of the explicit distinguishing of attorneys' fees from expert fees by Congress, not as an endorsement that attorneys' fees include expert fees under the IDEA. *See Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004).

> While it may be ironic that the legislative history of the IDEA was used as an example in *Casey* of a specification that attorneys' fees include expert fees, it is not inconsistent or contradictory . . . to conclude nevertheless that, according to the logic of *Casey* and governing rules of statutory interpretation, the IDEA's statutory language is clear and does *not* include expert fees within recoverable attorneys' fees.

Id. (emphasis in original).

C. The Circuit Court erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

Proper respect for the legislative powers vested in Congress "implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Albertini*, 472 U.S. 675, 680 (1985). It is a basic principle of statutory interpretation that the Court need not consider the legislative

history of a statute unless the plain language of the statute is ambiguous. *See, e.g., Burlington Northern R.R., Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete"). "The mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute." *United States v. Erikson P'ship*, 856 F.2d 1068, 1070 (8th Cir. 1988).

The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). "The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *Casey*, 499 U.S. at 98 "Where that contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.*; *see also United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms' ") (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

"Congress could have made explicit in the statutory language of the IDEA that attorneys' fees include expert fees." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "Yet, the fee shifting statute at issue here provides no explicit authorization of expert witness fees." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003). Instead, the IDEA states only that courts "may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). That language parallels the language of Section 1988 ("reasonable attorneys' fees as

part of the costs") that the Supreme Court concluded in *Casey* did not include expert fees within an award.[5] *See Casey*, 499 U.S. at 102. "The statutory language of the IDEA, like Section 1988, is not ambiguous, and therefore legislative history is not relevant to its interpretation." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "Even though a single passage in one piece of the legislative history may indicate otherwise, without occasion to consult such legislative history, it does not govern here."[6] *Id.* "Consistent with the reasoning in *Casey*, . . . Congress could have included expert costs in attorneys' fees by specifically stating so on the face of the statute." *Id.* "The fact that Congress did not do so is significant and determinative."[7] *Id.*

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5. In an apparent effort to backtrack from its holding that the IDEA's fee-shifting provision differed from Section 1988's treatment of awards of expert witness fees, *see Murphy*, 402 F.3d at 336-37, the Circuit Court recently clarified that it will "continue to interpret the IDEA's fee-shifting provisions in consonance with Section 1988 and other federal civil fee-shifting statutes, unless there is a specific reason . . . not to do so," *see A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 73 n.9 (2005).

6. Indeed, even if the congressional conferees intended that the IDEA fee provision encompass expert fees as the Circuit Court suggests, *see Murphy*, 402 F.3d at 337-38, they neglected to provide language in the conference bill that would have accomplished this purpose. Any argument that the Circuit Court should correct any committee oversight "profoundly mistakes" the judicial "role." *See Casey*, 499 U.S. at 100.

7. Other legislative history of the 1986 amendment to the IDEA supports the conclusion that Congress purposefully declined to include expert costs in attorneys' fees. Both the Senate and House bills at various times contained language that would have explicitly provided for expert fees. Thus, the report accompanying S. 415, the Senate bill to add a fee provision to the IDEA, discloses that the bill as reported out by the Senate Committee on Labor and Human Resources contained the following provision: "[T]he court may, in

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D. Public policy does not require recovery of expert fees in IDEA proceedings.

The Circuit Court correctly noted that "a prevailing parent in an IDEA case . . . can collect neither compensatory damages, monetary relief, nor punitive damages; rather, their relief rests solely in the appropriate education of their child."[8] *See Murphy*, 402 F.3d at 338; *see also Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998). The Circuit Court reasoned that "absent a fee shifting provision that allows for the recovery of appropriate expert fees, most parents with children with disabilities would have difficulty pursuing their case," *see Murphy*, 402 F.3d at 338,

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its discretion, award a reasonable attorney's fees, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to" a prevailing parent. *See* S. Rep. 99-112 at 7 (99th Cong. 1st Sess.) (July 25, 1985). On the floor, however, the Senate approved a substitute that did not mention witness fees and other expenses, but only attorneys' fees and costs. *See* 131 Cong. Rec. 21388-21389, 21393 (July 30, 1985).

In turn, the House's original bill, H.R. 1523, authorized the courts to "award reasonable attorneys' fees and other expenses as part of the costs." The "expenses" language was carried forward in the bill as reported out by the House Committee on Education and Labor, and the House Committee Report stated that this language encompassed expert fees. *See* H.R. Rep. 99-296 at 1, 6 (99th Cong. 1st Sess.) (Oct. 2, 1985). This language was abandoned, however, in the bill enacted by both Houses of Congress after debates in which no one suggested that the language Congress enacted — "attorneys' fees as part of the costs" — encompassed expert fees. *See* 132 Cong. Rec. 16761, 16823-16825 (July 17, 1986); 132 Cong. Rec. H4833-H4834 (daily ed. July 24, 1986) (now at 132 Cong. Rec. 17599-17600); 132 Cong. Rec. 17595, 17607-17612 (July 24, 1986).

8. However, "nothing in the IDEA precludes a claim for money damages under Section 1983 and, in fact, the IDEA expressly contemplates such claims." *R.B. v. Board of Educ. of New York*, 99 F. Supp. 2d 411, 418 (S.D.N.Y. 2000); *see also Butler v. South Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 420 (S.D.N.Y. 2000).

"thereby diminishing their ability to protect their [childrens'] rights to a free appropriate public education designed to meet their unique needs," *see Brillion v. Kent Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 872 (S.D. Tex. 2003), *aff'd in part & rev'd in part*, 100 Fed. Appx. 309 (5th Cir. 2004).[9]

Left unmentioned by the Circuit Court, however, was that "in IDEA administrative disputes, Congress had taken steps . . . that level the playing field." *See Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *cert. granted*, __ U.S. __, 125 S. Ct. 1300, 161 L. Ed. 104 (2005). As the Supreme Court observed, Congress recognized "that in any [IDEA] disputes the school officials would have a natural advantage," so it therefore "incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985). "These procedural safeguards and other provisions in the IDEA are all designed to inform parents and to involve them in the development of the IEP for their child." *Weast*, 377 F.3d at 453, *cert. granted*, __ U.S. __, 125 S. Ct. 1300, 161 L. Ed. 104 (2005).

The Act involves parents at all stages, making them members of their child's IEP team and enabling them to advocate for their position if a dispute arises. *See* 20 U.S.C. § 1414(d). Parents have the right to examine all records, materials, assessments, and other information the school system uses to develop an IEP, and they have the right to participate fully in meetings relating to the IEP and the evaluation of their child. *See* 20 U.S.C. § 1415(b). Parents have the right to request an independent evaluation of their child at school system expense. *See id.*; *see also* 34 C.F.R.

9. While the Circuit Court notes, *en passant*, that "expert testimony is often critical in IDEA cases, which are fact-sensitive inquires," *see Murphy*, 402 F.3d at 338, it is undisputed that Ms. Arons provided no expert testimony during the underlying impartial hearing.

§ 300.502(b)(2)(ii). The school system must give parents written notice of their rights at key intervals: when their child is initially referred for evaluation, when they are notified about each IEP meeting, when their child is reevaluated, and when they register any complaint about the school system's effort to provide a free appropriate public education for their child. *See* 20 U.S.C. § 1415(d)(1). The notice of the parents' rights must be written in "an easily understandable manner." *See* 20 U.S.C. § 1415(d)(2).

"If the parents request an administrative hearing, additional services and protections become available." *Weast*, 377 F.3d at 454, *cert. granted*, __ U.S. __, 125 S. Ct. 1300, 161 L. Ed. 104 (2005). Voluntary mediation conducted by an impartial mediator, with the school system bearing the costs, must be made available before the case proceeds to hearing. *See* 34 C.F.R. § 300.506. The school system must also advise the parents "of any free or low-cost legal and other relevant services available in the area." *See* 34 C.F.R. § 300.507(a)(3). "There are also discovery requirements that give parents advance notice of the evidence they will encounter at a hearing." *Weast*, 377 F.3d at 454, *cert. granted*, __ U.S. __, 125 S. Ct. 1300, 161 L. Ed. 104 (2005). A party may not introduce evidence that is not disclosed at least five business days before the hearing. *See* 34 C.F.R. § 300.509(a)(3). Likewise, at least five business days prior to the hearing, "each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing." *See* 20 U.S.C. § 1415(f)(2)(A). Finally, if the parents prevail in their challenge, they may be awarded reasonable legal fees. *See* 20 U.S.C. § 1415(i)(3)(B).

Thus, "the IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents." *Weast*, 377 F.3d at 454, *cert. granted*, __ U.S. __, 125 S. Ct. 1300, 161 L. Ed. 104 (2005). "By the time the IEP is finally developed, parents have been provided with substantial

information about their child's educational situation and prospects." *Id.* "They have continuing access to information and anticipated evidence once a hearing is requested." *Id.* "In sum, Congress has taken into account the natural advantage a school system might have in the IEP process, including the administrative hearing, by providing . . . explicit protections." *Id.* As a result, the school system has no unfair information or resource advantage that compels recovery of expert fees for prevailing parents.

II. The Circuit Court erred in permitting, under the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), the recovery of a non-testimonial expert assisting parents in an impartial due process hearing without the guidance of a licensed attorney

Although the IDEA confers on parents of disabled children the right to be accompanied by individuals with special knowledge or training, *see* 20 U.S.C. § 1415(h)(1), at impartial due process hearings convened under the Act, *see* 20 U.S.C. § 1415(f)(1), parents may not seek attorneys' fees (or the equivalent of attorneys' fees) under the IDEA's fee-shifting provision, *see* 20 U.S.C. § 1415(i)(3)(B), for the services of such individuals.[10]

"In the United States, parties are ordinarily required to bear their own attorneys' fees . . . absent explicit statutory

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10. Section 1415(h)(1) provides:

> Any party to a hearing required by subsection (f) or (k) of this section, or appeal conducted pursuant to subsection (g) of this section, shall be accorded —
>
> (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

20 U.S.C. § 1415(h)(1).

authority" to seek such fees from the losing party. *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Section 1415(i)(3)(B) of the IDEA provides explicit statutory authority for parents prevailing in any action or proceeding brought under the Act to recover their attorneys' fees from a school district. *See* 20 U.S.C. § 1415(i)(3)(B).[11]

The Circuit Court erred in concluding that "it would be inconsistent with the IDEA's conferral of the right to be accompanied by an individual with special knowledge to find that the IDEA's fee shifting provision barred compensation for such an individual's service." *See Murphy*, 402 F.3d at 338. Ms. Arons is not licensed to practice law in this State or any other. Ms. Arons accompanied and advised the parents at an impartial due process hearing convened in accordance with Section 1415(f)(1). Although the Circuit Court assumes that Ms Arons accompanied the parents to the hearing as an "individual with special knowledge or training with respect to the problems of children with disabilities," *see Murphy*, 402 F.3d at 338, her "special knowledge or training" was never formally established at the hearing. Notwithstanding the absence of a license to practice law, Ms. Arons routinely performed tasks at the hearing which one can fairly characterize as the practice of law. According to Ms. Arons' own certifications, she accepted the parents' case, she set a fee, she gave legal advice, she planned legal strategy, she prepared examination questions of witnesses, she took testimony from witnesses, she made and responded to motions and objections and she prepared post-hearing

11. Previously, the Circuit Court has defined what constitutes a "prevailing party," *see J.C. v. Regional Sch. Dist. 10*, 278 F.3d 119, 124 (2d Cir. 2002), and an "action or proceeding," *see Vultaggio v. Board of Educ.*, 343 F.3d 598, 603 (2d Cir. 2003), under the IDEA's fee-shifting provision, *see* 20 U.S.C. § 1415(i)(3)(B). Here, there is no dispute that the parents are prevailing parties in an action or proceeding arising under the IDEA.

briefs.[12] The effect of the Circuit Court's decision is to reward, and provide future incentives for, the unauthorized practice of law.

A. The IDEA does not provide for the compensation of individuals with special knowledge or training for accompanying and advising parents at impartial hearings.

Educational consultants, non-lawyer representative and lay advocates may not charge fees for services that constitute the practice of law. *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62-63 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988).[13] Likewise, the IDEA does not provide for advocates, such as Ms. Arons, to recover fees for their involvement in special education impartial hearings as reasonable attorneys' fees. *See Connors v. Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998) ("in the absence of affirmative state action in promulgating regulations that govern the training and conduct

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12. It is still an open question whether or not advocates may function at impartial due process hearings in this manner without running afoul of state rules prohibiting the unauthorized practice of law ("UPL"). *See In re Arons*, 756 A.2d 867 (Del. 2000) (finding that such representation violates Delaware's UPL rules), *cert. denied*, 532 U.S. 1065 (2001). Every state in the Union, including New York, has a law prohibiting the UPL. *See* N.Y. Jud. Law §§ 478, 484 (McKinney Supp. 2005); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.16 (2004) (codifying Model Code of Prof'l Responsibility DR 3-101). In New York, only the Attorney General is authorized to pursue an action for UPL. *See* N.Y. Jud. Law § 476-a (McKinney 1983); *Lawrence v. Houston*, 172 A.D.2d 923, 567 N.Y.S.2d 962, 964 (3d Dep't 1991).

13. The "Arons" in *Arons v. New Jersey Bd. of Educ.*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988), *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) and *Borough of Palmyra Bd. of Educ.*, No. 97 Civ. 6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) is the same Arons for which the parents in this action seek recovery of expert fees. *See Murphy*, 2003 WL 21694398 at *4, *aff'd*, 402 F.3d 332 (2d Cir. 2005).

of lay advocates, plaintiff's request for Mrs. Arons' fees . . . must be denied."); *Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164, 1182 n.17 (S.D.N.Y. 1992). "Nothing in the language of the [IDEA] imposes any requirement on the state or creates any rights, either in parents of handicapped children or lay advocates, for monetary compensation of lay advocate services." *Arons v. New Jersey State Bd. of Educ.*, No. 85 Civ. 209, 1987 WL 10808, at *4 (D.N.J. May 12, 1987), *aff'd*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988).

Likewise, even if one assumes, *arguendo*, that litigation consultant fees are recoverable under IDEA, *see B.D. v. DuBuono*, 177 F. Supp. 2d 201, 204 (S.D.N.Y. 2001), Ms. Arons cannot recover her fees as a litigation consultant. "Litigation consultants . . . are trained in various aspects of courtroom practice and procedure. They are consulted by litigators to hone their trial skills in the context of a particular case." *See B.D. v. DuBuono*, 177 F. Supp. 2d at 204. Ms. Arons has no specialized training in courtroom practice and procedure. *See In re Arons*, 756 A.2d 867, 869 (Del. 2000), *cert. denied*, 532 U.S. 1065 (2001).

Even if one assumes, again *arguendo*, that educational consultant fees are authorized by the IDEA, prevailing parties may only seek reimbursement of these costs when these services assist the work of a licensed attorney.[14] *See P.G. v. Brick Township Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000); *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 473 n.14 (D.N.J. 1998); *S.D. v. Manville Bd. of Educ.*, 989 F. Supp. 649, 654 n.1 (D.N.J. 1998).

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14. This interpretation of Section 1415(i)(3)(B) is consistent with the district court's admiralty law analogy where radar experts assisted counsel in trying cases involving collisions of ships at sea, *see Murphy*, 2003 WL 21694398 at *10, *aff'd*, 402 F.3d 332 (2d Cir. 2005).

CONCLUSION

The petition for a Writ of Certiorari is meritorious, and should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 29, 2005, AMENDED APRIL 15, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Argued: December 16, 2004
Decided: March 29, 2005
Amended: April 15, 2005)

Docket No. 03-7850-cv

PEARL MURPHY, THEODORE MURPHY,

Plaintiffs-Appellees,

—v.—

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant-Appellant.

Before: NEWMAN, POOLER, AND KATZMANN, Circuit Judges.

Appeal from a Memorandum Opinion and Order of the United States District Court for the Southern District of New York (Haight, Jr., *J.*). Affirmed

Appendix A

KATZMANN, Circuit Judge.

This case of first impression calls upon us to determine whether a prevailing plaintiff may recover expert fees under the Individuals with Disabilities Education Act ("IDEA")'s fee shifting provision, 20 U.S.C. § 1415(i)(3)(B), which authorizes a court to award "costs.[1] We affirm the judgment of the United States District Court for the Southern District of New York (Charles S. Haight, Jr., *Judge*), and hold that expert fees are compensable as costs under the IDEA. Moreover, we hold prospectively that a plaintiff's application for fees for experts or consultants who perform services in IDEA actions will normally not be approved unless the application is accompanied by time records contemporaneously maintained by the person performing the services.

BACKGROUND

In August 1999, Pearl and Theodore Murphy (collectively, the "Murphys"), *pro se,* filed a complaint on

1. We note that Section 1415 has been much amended in recent years. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub.L. No. 108-446, Sec. 101, § 615, 118 Stat. 2647; Education Flexibility Partnership Act of 1999, Pub.L. No. 106-25, § 6(a), 113 Stat. 41, 49; IDEA Amendments of 1997, Pub.L. No. 105-17, Sec. 101, § 615, 111 Stat. 37, 88-99. The subsection with which we are here concerned has not, however, been altered since the 1997 Amendments. Additionally, we note that although certain portions of the 1997 Amendments did not take effect until 1998, the 1997 revision to Section 1415 took effect immediately upon passage. IDEA Amendments of 1997, Pub.L. No. 105-17, § 201(a), 111 Stat. 37, 156.

behalf of their son Joseph Murphy pursuant to the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1400 et seq.[2] In their complaint, the Murphys sought to require Arlington Central School District Board of Education ("Arlington") to pay Joseph's tuition at a private school for certain school years. Ultimately, the Murphys prevailed in the district court, and this Court affirmed the district court's judgment in the Murphys' favor. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F.Supp.2d 354, 368 (S.D.N.Y.2000), *aff'd*, 297 F.3d 195 (2d Cir.2002).[3]

By letters dated January and February 2003, the Murphys requested that the district court order Arlington to pay fees and costs incurred during the course of the federal litigation and state administrative proceedings. Included among the Murphys' expenses were $29,350 in fees pertaining to the services of Marilyn Arons, M.S., an educational consultant.

In March 2003, Arlington opposed the Murphys' application for fees, arguing that the district court should "deny or substantially reduce" the amount of Arons's fees because: (1) the IDEA does not allow "lay advocates" to recover attorneys' fees; (2) although experts' fees are recoverable, Arons's fees could not be recovered because she did not testify as an expert, or provide a litigation consulting

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2. Although the Murphys are proceeding *pro se* on appeal, Public Citizen, Inc. filed an *amicus curiae* brief in support of the Murphys.

3. The facts and procedural history pertaining to the merits of the underlying IDEA claims are fully stated in the above-referenced cases.

service, as Arons has no specialized training in courtroom practice or procedure; (3) Arons's time records were insufficient; (4) Arons failed to establish that there was a market rate for her services; and (5) Arons's fees pertaining to her representation of the Murphys during non-judicial state "special education due process hearings" were specifically exempted from the IDEA.

By Memorandum and Opinion Order dated July 22, 2003, the district court granted the Murphys' application in part, and denied it in part. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 99 Civ. 9294, __ F.Supp.2d __, 2003 WL 21694398, 2003 U.S. Dist. LEXIS 12764 (S.D.N.Y. July 22, 2003) The district court found that the IDEA provides that the district court, in its discretion, may award a parent who is a "prevailing party" "reasonable attorneys' fees" and that, at impartial due process hearings, a party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." *Id.* at *Murphy*, 2003 WL 21694398 at *4 (citing 20 U.S.C. § 1415(d)(1) and (e)(4)(B)).[4] The district court endorsed the approach of the Third Circuit, which held that specially qualified individuals such as Arons could not collect "attorneys' fees" for doing work similar to that of an attorney, but could collect for expert consulting services. *See id.* at * 4 (citing *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.1988)).

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4. The district court inadvertently referred to the wrong version of Section 1415, citing not to Section 1415 as revised by the IDEA Amendments of 1997, but to an earlier version. This error is immaterial to the issues here raised and resolved on appeal.

The district court then stated that it was "in general agreement" with the district courts in *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97- 6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) and *Connors v. Mills*, 34 F.Supp.2d 795 (N.D.N.Y.1998) and that, insofar as the Murphys' claim for Arons's fees was allowable, it was "subject to a substantial discount." *Murphy*, 2003 WL 21694398 at *8. The district court found that Arons's time records were sufficient, notwithstanding the fact that there was no evidence that Arons kept "contemporaneous time records"; unlike attorneys, the district court observed, experts and consultants are not required to keep such records and her "certifications" of services allowed the claims for fees to be considered. *Id.*

The district court determined that Arons's fees for consulting services were compensable from the time the Murphys requested an impartial hearing on September 3, 1998, until the Murphys became "prevailing parties" under the IDEA on March 1, 2000, the date of the district court's ruling in their favor. *Id.* at *9. The district court stated that it did not use the date of this Court's affirmance because the Arons were represented by counsel at that time, and there was no evidence before the court that Arons had rendered any advice regarding the appeal. *Id.* at *9 n. 10.

The court considered which of Arons's services, within the above-described temporal parameters, were compensable under the IDEA based on the standards set forth in *Palmyra* and *Connors*. *Id.* at *9 -*10. Following the *Palmyra* court, Judge Haight found that the market rate for Arons's services was $200 per hour. *Id.* at *10. The court determined that the

Murphys' claims for mileage costs due to Arons's lack of a driver's license were not compensable. *Id.* at *11. Because the Murphys had not yet paid Arons, the court ruled that an award of pre-judgment interest was not warranted. *See Id.* The court concluded that the Murphys were entitled to recover $8,650 for Arons's fees from Arlington. *Id.*

On August 20, 2003, Arlington timely filed a notice of appeal from the district court's July 22, 2003 Memorandum Opinion and Order.

DISCUSSION

A. Standards of Review

We generally review a district court's award of attorneys' fees under the IDEA for abuse of discretion. *See G.M. ex rel. R.F. v. New Britain Bd. of Educ.*, 173 F.3d 77, 80 (2d Cir.1999). However, where an appellant challenges "a district court's interpretation of the fee statute itself, our review of this legal issue is *de novo*." *J.C. ex rel. C. v. Regional Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123 (2d Cir.2002) (citing *Doyle v. Kamenkowitz*, 114 F.3d 371, 374 (2d Cir.1997); *Mautner v. Hirsch*, 32 F.3d 37, 39 (2d Cir.1994)). Thus, we review the district court's interpretation of the IDEA's fee-shifting provision *de novo*, and its fee award for abuse of discretion.

B. Whether the Murphys May Recover Fees for Expert Consultation Under the IDEA

It is a question of first impression in this Court whether a prevailing party under the IDEA may recover fees for the

services of an educational consultant under the IDEA's fee-shifting provision.[5] Under the IDEA, "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). Arlington does not dispute that the Murphys constitute a prevailing party; however, Arlington argues that the Murphys, who proceeded *pro se* in the district court, cannot recover for Arons's fees because she is not an attorney and the IDEA does not otherwise allow a prevailing party to recover fees for experts such as Arons. The Murphys and Public Citizen, Inc. as *amicus curiae* argue that the IDEA's use of the word "costs" should be interpreted to allow reimbursement for expert fees.

Two sister circuits, focusing exclusively on the text, have recently concluded that, although the IDEA's fee provision appears to contemplate that costs include something more than attorney's fees, it "does not specifically authorize an award of costs or define what items are recoverable as costs," and that absent a specific authorization for the allowance of expert witness fees, "federal courts are bound by the

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5. Arlington urges that this Court "leave the answer" to the question of whether expert fees are compensable under the IDEA "for another day because Ms. Arons did not provide any expert testimony under the guidance of a licensed attorney at any stage of the proceedings." Appellant's Reply Br. at 3-4. Arlington's argument is misplaced. The district court did not award Arons fees as a testifying witness; rather, it adopted the position of the Third Circuit and held that Arons may, as an expert, collect under the statute for a limited range of activities, including consulting services. *See Murphy*, 2003 WL 21694398 at *4. (citing *Arons*, 842 F.2d 58 (3d Cir.1988)).

limitations set out in 28 U.S.C. § 1821 and § 1920." *Neosho R-V Sch. Dist. v. Clark ex rel. Clark,* 315 F.3d 1022, 1031 (8th Cir.2003); *see also T.D. v. LaGrange Sch. Dist. No. 102,* 349 F.3d 469, 482 (7th Cir.2003).

While we appreciate—and in practice honor, wherever possible—the virtues of relying solely on statutory text, at times text without context can lead to results that Congress did not intend. In our view, although "costs" is a term of art that generally does not include expert fees in civil rights fee-shifting statutes, we believe that Supreme Court precedent, the legislative history of the IDEA upon which the Supreme Court relied in *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83 (1991), *abrogated by statute,* 42 U.S.C. § 1988(c), and Congressional action in the aftermath of the Supreme Court's ruling in *Casey,* require us here to find that Congress intended to and did authorize the reimbursement of expert fees in IDEA actions.

By way of background, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* the Supreme Court, addressing fee-shifting for expert witnesses under Federal of Civil Procedure 54(d) in an antitrust case, held that "when a prevailing party seeks reimbursement for fees paid to its own expert witness, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S. 437, 439 (1987). Under § 1821(b), witnesses fees are limited to $40 per day for each day's attendance. Four years later, in *Casey,* the Supreme Court employed the same analysis in construing the fee-shifting provisions of civil rights statutes. Specifically, the Court held that while a prevailing party could recover "a reasonable attorney's fee

as part of the costs" in civil rights actions, 499 U.S. at 85 n. 1 (quoting 42 U.S.C. § 1988), a prevailing party could *not* recover "expert fees" under 42 U.S.C. § 1988, 499 U.S. at 87 (quoting *Crawford Fitting*), because there was no "explicit statutory authority" indicating that Congress intended for that sort of fee-shifting. *Casey,* 499 U.S. 83 (1991).

Notably, in reaching this result, the Court expressly compared—and contrasted— § 1988 to the IDEA, the statute we construe in the instant case. The Court observed, in dicta, that a Conference Committee Report on the IDEA stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *Id.* at 91 n. 5 (quoting H.R. Conf. Rep. No. 99-687, p. 5 (1986), [hereinafter, the "Conference Committee Report"]) (omission in original). Justice Scalia, author of the majority opinion in *Casey,* acknowledged that "[t]he statement is an apparent effort to *depart* from ordinary meaning and to define a term of art." *Id.* (emphasis in the original).

We believe that this dicta, as well as the legislative history it relies upon, require us to construe the IDEA as providing for the reimbursement of costs such as those incurred here by Arons in conducting the expert evaluation. For as the Supreme Court, itself, strongly intimated, the IDEA is different from ordinary fee-shifting statutes, because the legislative history of the IDEA unambiguously demonstrates

that Congress expressly intended to *allow*, rather than *prevent*, prevailing parties to recover the costs of experts.

In *Casey*, the Supreme Court signaled to Congress that if it wished for expert witness fees to be awarded as costs under § 1988, it would have to amend the then existing § 1988, but that no such action was necessary with regard to IDEA expert witness fees because the Conference Committee report indicated that such expert witness fees were authorized as part of costs under the law. We therefore find it instructive that shortly after the Court's decision in *Casey*, Congress amended § 1988 in order to make expert fees compensable in civil rights actions, but Congress took no similar action with respect to the IDEA. Civil Rights Act of 1991, Pub.L. No. 102-166, § 113, 105 Stat. 1071. We believe it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act.[6]

To those who would question our resort to legislative history, we observe that it was Justice Scalia, a noted skeptic of the use of legislative history, who authored *Casey*'s dicta

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6. And we again note that it is not as if Congress has failed to amend the IDEA, having done so a number of times since *Casey*, most recently, in December 2004. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub.L. No. 108-446, Sec. 101, § 615, 118 Stat. 2647; Education Flexibility Partnership Act of 1999, Pub.L. No. 106-25, § 6(a), 113 Stat. 41, 49; IDEA Amendments of 1997, Pub.L. No. 105-17, Sec. 101, § 615, 111 Stat. 37, 88-99.

about the apparent effort by Congress to depart from the ordinary meaning of the term "costs" in the IDEA. *See generally,* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997). We also recognize that, while some legislative history is less reliable than others, a conference committee report is generally among the most authoritative. *See Disabled in Action of Metro. N.Y. v. Hammons,* 202 F.3d 110, 124 (2d Cir.2000) ("Because a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.") (*quoting Ry. Labor Executives' Ass'n v. Interstate Commerce Comm'n,* 735 F.2d 691, 701 (2d Cir.1984)); *see also* William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation,* 307 (2000); Robert A. Katzmann, *Courts and Congress* 63-64 (1997) (quoting Judge James L. Buckley as remarking that, as a senator, "my understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report"). We do not ignore the Conference Committee Report here, given the Supreme Court's acceptance of it, the general reliability of the Conference Committee Report itself, and the settled legislative expectations that have obviously resulted in the wake of the *Casey* decision.

Our holding is also consistent with the purposes of the IDEA, which are to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living" and "to ensure that the

rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A), (B). Expert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education. The IDEA's procedural safeguards ensure that children and parents can realize whatever benefits are due. Thus, for example, parties to IDEA proceedings have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," 20 U.S.C. § 1415(h)(1), and "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). An expert such as Arons falls within the category of "individuals with special knowledge." It would be inconsistent with the IDEA's conferral of the right to be accompanied by an "individual[ ] with special knowledge" to find that the IDEA's fee shifting provision barred compensation for such an individual's service. Moreover, a prevailing plaintiff in an IDEA case, in contrast to other civil rights statutes, can collect neither compensatory damages, monetary relief, nor punitive damages; rather, their relief rests solely in the appropriate education of their child. Absent a fee shifting provision that allows for the recovery of appropriate expert fees, most parents with children with disabilities would have difficulty pursuing their case. Prohibiting expert witness fees for prevailing parents would thus frustrate the purposes of the IDEA, resulting in fewer children receiving the education they deserve.

Appendix A

In reaching the conclusion that the IDEA's fee-shifting provision allowed for the award of experts' fees, we join the Third Circuit, the first court of appeals to address the issue. *Arons,* 842 F.2d 58. In that case, the same Arons who assisted the Murphys in the present case—a self-described lay advocate authorized to represent parents in IDEA due process hearings under New Jersey law—sought to recover attorneys' fees for her successful representation of parents in an IDEA proceeding. *Id.* at 61. Arons claimed that although a state rule prohibited non-lawyer advocates from collecting legal fees, the Education for All Handicapped Children Act (reenacted in 1990 as the IDEA) preempted the state rule and therefore allowed her to collect legal fees. *Id.* The Third Circuit disagreed. *Id.* at 63. However, although the Third Circuit held that Arons could not recover *legal* fees, it held that she could recover expert fees. Relying on the IDEA Conference Committee Report, the Third Circuit wrote that:

> nothing [in the IDEA] prevents [Arons] from receiving compensation for work done as an expert consultant or witness. Although we appreciate the difficulty of trying to allocate between compensable time spent in consultation and noncompensable time spent in legal representation, the task is not insurmountable. The receipt of consultation fees should eliminate the financial losses Arons claims to have sustained in the course of providing assistance to parents of handicapped children.

Id. at 62. The court went on to state that New Jersey's prohibition on non-lawyer advocates collecting legal fees

"will not frustrate the [IDEA's] purpose of providing parents with expert assistance in navigating the administrative process," because such parents could seek reimbursement for expert fees as part of the "costs" incurred in IDEA actions. *Id.* at 63. The district courts in this Circuit have similarly held that expert fees are compensable under the IDEA, *see, e.g., BD v. DeBuono,* 177 F.Supp.2d 201, 207-08 (S.D.N.Y.2001) (finding, based on the IDEA's legislative history, that expert fees are reimbursable), and no court in this Circuit has since found otherwise, *see J. v. Bd. of Educ.,* 98 F.Supp.2d 226, 242-43 (D.Conn.2000) (noting that district courts in other Circuits have found that expert fees are non-compensable under the IDEA, and finding those decisions unpersuasive based on the IDEA's legislative history). This approach has also been followed by district courts in the First, Fifth, and Sixth Circuits, although our sister Circuit Courts have rarely addressed the issue. *See, e.g., Pazik v. Gateway Reg'l Sch. Dist.,* 130 F.Supp.2d 217, 220-22 (D.Mass.2001); *Brillon ex rel. Brillon v. Klein Indep. Sch. Dist.,* 274 F.Supp.2d 864, 870-72 (S.D.Tex.2003), *rev'd on other grounds,* 100 Fed.Appx. 309 (5th Cir.2004); and *Gross ex rel. Gross v. Perrysburg Exempted Vill. Sch. Dist.,* 306 F.Supp.2d 726, 737-39 (N.D.Ohio 2004); *but see McC. v. Corrigan-Camden Indep. Sch. Dist.,* 909 F.Supp. 1023, 1033 (E.D.Tex.1995). We agree and hold that expert fees are compensable as costs under the IDEA.

C. Whether the District Court's Fee Award was an Abuse of Discretion

Having determined that expert fees are compensable under the IDEA, we must determine whether the district court

abused its discretion in determining the amount of the fee award—$8,650 (less than one-third of the amount sought). The only argument offered by appellants is that the district court abused its discretion by awarding Arons fees based on bills that were not contemporaneous time records. While attorneys must document an application for fees with contemporaneous time records, *see New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1147-48 (2d Cir.1983), no such rule exists for experts or consultants. We see no reason why such experts or consultants, rendering professional services, should not be required to provide similar documentation in support of their claims for fees. Accordingly, by analogy to *New York State Ass'n for Retarded Children, Inc.*, we hold prospectively that a plaintiff's application for fees for experts or consultants who perform services in IDEA actions will normally not be approved unless the application is accompanied by time records contemporaneously maintained by the person performing the services. Because it would be unfair to retroactively apply such a rule to the expert in the case at hand, we find that the district court did not abuse its discretion in not requiring Arons to submit contemporaneous records with the application for fees. Moreover, we find, after an independent review of the record, including Arons's bills and relevant case law, that there are no other errors in the district court's careful Memorandum Opinion and Order.

Appendix A

CONCLUSION

For the foregoing reasons, the Memorandum Opinion and Order of the district court is AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 22, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 99 Civ. 9294 (CSH)

PEARL MURPHY AND THEODORE MURPHY,

Plaintiffs,

-against-

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior United States District Judge:

The sole remaining issue in this action commenced under the Individuals with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. §§ 1400 *et seq.*, concerns the entitlement of the plaintiffs, parents of a disabled child who successfully sued the defendant school district to recover their child's tuition at a private school during certain school years, to recover costs incurred for the services of an educational consultant and transportation incurred by plaintiffs during the pertinent times. Plaintiffs rely upon the fee-shifting

provisions which the Act contains for the benefit of prevailing parties in actions commenced pursuant to its terms.

I. PROCEDURAL HISTORY

Familiarity with all prior opinions of this Court and the Court of Appeals is assumed. For present purposes, it is sufficient to state that plaintiffs Pearl Murphy and Theodore Murphy, the parents of Joseph Murphy, a "child with a disability" as that term is defined by the Act, 20 U.S.C. § 1401(3)(A), and enrolled at the Arlington High School, maintained by defendant Arlington Central School District Board of Education (the "District"), decided at the end of the 1997-1998 school year that the Arlington School was no longer an appropriate educational placement for Joseph, given his condition. Plaintiffs unilaterally withdrew Joseph from the Arlington School, and enrolled him for the 1998-1999 school year at the Kildonan School, a private school. At the same time, plaintiffs pursued the administrative remedies provided, as required by IDEA, with respect to such educational placements by the applicable state statute, N.Y.Educ.Law 4404 (McKinney 1999). Those proceedings eventually resulted in a decision dated July 7, 1999 by an impartial hearing officer ("IHO"), who concluded that the District's educational plan for Joseph for the 1998-1999 school year was inadequate to meet his special needs; that Kildonan was an appropriate placement; and that plaintiffs were entitled to reimbursement for Joseph's tuition at Kildonan and the costs of a private speech pathologist.[1]

1. The District's papers opposing plaintiffs' claims for costs state that the name of the IHO who reached these conclusions was

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The District lodged an administrative appeal from that decision with the state review officer ("SRO"). While that appeal was pending before the SRO, plaintiffs commenced this action, first in the Northern District of New York, and subsequently transferred to this Court.

In an opinion dated March 1, 2000, *Murphy v. Arlington Central School District Board of Education*, 86 F. Supp.2d 354 (S.D.N.Y. 2000), this Court held that under the provisions of the IDEA, the District was obligated to reimburse plaintiffs for Joseph's tuition covering the period beginning on September 17, 1999 to date, and to continue to fund his tuition as long as Kildonan remained Joseph's current educational placement.[2] The District appealed. The Second Circuit affirmed this Court's decision. 297 F.3d 195 (2d Cir. 2002).

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Leonard W. Krouner, who subsequent to his rulings in the administrative proceeding involving plaintiffs pleaded guilty in a state court to "multiple charges of fraud for collecting disability insurance while also serving as an impartial hearing officer," and would "surrender his law licence." Affidavit of Barbara J. Donegan, Assistant Superintendent for Pupil Personnel Services of the District, verified March 6, 2003 ("Donegan Aff.") at ¶ 13; Defendant's Brief at 4 n.1. The news reports attached to the affidavit make it plain that the misconduct leading to Mr. Krouner's conviction had nothing to do with the case involving the Murphy family or the conclusions he reached in that case. It is difficult to discern a legitimate objective of advocacy which counsel for the District think they are pursuing in calling these wholly extraneous facts to the Court's attention in the context of the plaintiffs' present application for costs.

2. The District had previously reimbursed plaintiffs for Joseph's tuition at Kildonan for the 1998-1999 school year, following a decision in plaintiffs' favor by the state review officer. *See* 86 F. Supp.2d at 356.

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Plaintiffs now apply for an order directing the District to pay costs they incurred during the times in question. Specifically, plaintiffs seek to recover the fees of Marilyn Arons, an educational consultant, and mileage expenses plaintiffs incurred in transporting Joseph to and from Arons's office, the offices of neurologists and speech therapists, and administrative hearings. In a Memorandum and Order reported at 2003 WL 367872 (S.D.N.Y. Feb. 19, 2003), I directed the submission of further papers in connection with that application. Those submissions have been made, and the issue is now ripe for decision.

II. FACTUAL BACKGROUND

The public policy implemented by the IDEA is to assure that all children with disabilities receive a free public education appropriately designed to meet their particular learning needs. The District seeks to achieve that purpose through the vehicle of a Committee on Special Education ("CSE"), headed by Assistant Superintendent Barbara J. Donegan. "The primary mission of the CSE is to identify, locate, and evaluate all disabled children within the District's borders and develop individualized education programs ("IEP's") that address their educational needs." Donegan Aff. at ¶ 2. A written IEP is mandated by the Act, and is prepared at a meeting between the child's teacher, a school representative qualified in special education, and the child's parents.

An IEP is not binding on the parents. The IDEA gives them the right to "present complaints with respect to any matter relating to the identification, evaluation, or educational

placement of the child," 20 U.S.C. § 1415(b)(1)(E), with the concomitant right to "an impartial due process hearing" before the state educational agency, § 1415(b)(2).[3] The Act gives states the freedom to design a one or a two-tier review process. As the prior decisions in the case at bar reflect, New York opted for a two-tier system. Parents dissatisfied by the final administrative decision may file suit "in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2).

According to the first certification of Marilyn Arons submitted on the present application, Arons "was asked by Pearl Murphy to help her son receive an appropriate education in October of 1997. . . . She originally asked that I serve as an educational consultant in order to have an IEP developed in accordance with his needs." Arons's certification of services rendered in this case indicates that she holds a master's degree. A 1998 Third Circuit decision states that Arons, the mother of two handicapped children and a New Jersey resident, "[a]s a professional educator . . . specializes in curriculum development for exceptional children," and "[a]s a lay advocate, she acts on behalf of parents of handicapped children at administrative hearings" conducted by New Jersey educational authorities. *Arons v. New Jersey State Board of Education*, 842 F.2d 58, 60 (3d Cir. 1988). Arons has subsequently extended her consulting and

3. The Act's section numbers appearing in text are taken from the statute as it existed in 1997, when the events pertinent to this case began. The Act was subsequently amended in 1999 and its provisions were restructured and renumbered. For example, the right to an impartial due process hearing is now found in § 1415(f).

advocacy practices to New York families, as is demonstrated by *J.S. v. Ramapo Central School* District, 165 F. Supp.2d 570 (S.D.N.Y. 2001), *Connors v. Mills*, 34 F. Supp.2d 795 (N.D.N.Y. 1998), and the case at bar. She has also represented a family in Delaware. *See Coale v. State Department of Education*, 162 F. Supp.2d 316 (D. Del. 2001).

As noted, during the academic year 1997/1998 Joseph Murphy attended a District school. According to Arons's summary, she rendered her first services to plaintiffs on certain dates in November and December, 1997, when she reviewed Joseph's school history and records, developed a statement of current educational status and goals for an "IEP meeting," and prepared for, attended and participated in a CSE meeting. Arons's summary then states that on January 8, 1998 she was consulting with plaintiffs "re: placement of Joe at Kildonan," and the record in the case shows that plaintiffs unilaterally enrolled their son in the Kildonan School "prior to a scheduled meeting of the CSE held on July 30, 1998." Donegan Aff. at ¶ 9.

Plaintiffs paid Joseph's tuition at the Kildonan School for the academic year 1998/1999. By letter dated September 3, 1998, plaintiffs requested an impartial hearing to determine whether the District should be required under the Act to reimburse them for the 1998/1999 Kildonan tuition and for the costs of private speech therapy. Donegan Aff. at ¶ 10. After conducting a hearing, the IHO concluded held that the District had not afforded Joseph a free and appropriate public education, held that plaintiffs had appropriately placed Joseph in the Kildonan School, ordered the District to reimburse plaintiffs for the Kildonan 1998/1999 tuition, and further

ordered the District to reimburse plaintiffs for the cost of private speech therapy incurred during the 1997/1998 academic year. The District appealed to the SRO by petition dated August 17, 1999, who in a ruling dated December 14, 1999 but effective as of September 17, 1999 sustained the IHO's decision to award plaintiffs reimbursement for the Kildonan tuition for the 1998/1999 academic year, but reversed the award of reimbursement for private speech therapy during the prior year. Donegan Aff. at ¶¶ 12, 14, 25-26.

During the pendency of the District's appeal to the SRO with respect to Joseph's placement during the 1998/1999 academic year, the 1999/2000 year approached, and on September 2, 1999 the District convened a CSE to consider placement for that year. *See Murphy*, 86 F. Supp.2d at 356. "An IEP was proposed placing Joseph back at Arlington High School. Plaintiffs did not accept this IEP and continued to enroll Joseph at Kildonan," funding the tuition for that academic year as well. *Id.* As noted in Part I, *supra*, plaintiffs commenced this action in August 1999. The ultimate decision reached by this Court, dated February 25, 2000 and subsequently affirmed by the Second Circuit, was that Kildonan School constituted Joseph's "current educational placement," a conclusion which under the Act's statutory scheme made the District "financially responsible for Joseph's tuition beginning from the effective date of the SRO decision, September 17, 1999, and going forward." *Id.* at 368. The economic effect of that ruling was to require the District to reimburse plaintiffs for the major portion of the 1999/2000 tuition at Kildonan School.[4] This Court has not been asked to

4. As a result of the SRO's decision in plaintiffs' favor, on January 24, 2000 the District reimbursed plaintiffs for the 1998/1999 Kildonan tuition, in the amount of $20,750.00. *See* 86 F. Supp.2d at 356.

make any further rulings with respect to the plaintiffs' rights and the District's obligations under the IDEA.

Arons's certification summarizes services she rendered to plaintiffs and their son Joseph from November 1, 1997 to and including July 19, 2002. Those services are allocated among five academic years: 1997/1998 (21.5 hours); 1998/1999 (40.25 hours); 1999/2000 (17.75 hours); 2000/2001 (45.75 hours); and 2001/2002 (21.5 hours). These allocations yield a total of 146.75 hours. Arons values her time at $200 an hour, and so the claim for her services is $29,350.[5] Plaintiffs do not by this application seek reimbursement for payment of this or any other amount to Arons. They are not in a position to do so because they have not paid Arons anything. In her certification Arons explains why that is so. She states that "[t]he attached bill for Joseph Murphy was made in accordance with my understanding of those areas for which the Second Circuit permits me to bill for services," and goes on to say that in view of plaintiff Pearl Murphy's "financial circumstances and the issues in her son's case as she understood them," and "[b]ecause of the unusual nature of the case, as well as the fragile state of her son's development, I agreed to take the case on a contingency." Arons continues:

> A verbal contract was agreed upon in which the family agreed to seek my fees from the Arlington

5. Arons's summary incorrectly concludes with a "Total Consultation Hours" calculation of 125.5 hours. The amount claimed, $29,350, reflects the accurate total of 146.75 hours, charged at the hourly rate of $200.

> School District or a court of competent jurisdiction in the event there was litigation and the family became the prevailing party. I have never received payment for any services provided since 1997. I have stayed with the case because of my concern for the social, emotional, academic and developmental welfare of Joseph, a child I deemed to be at significant risk without appropriate intervention.

The principal questions on this application are whether, in the circumstances of the case, the District is obligated by the IDEA to pay for Arons's services to the plaintiffs, and if so, in what amount.

III. DISCUSSION

A. Fee Shifting and Representation under the IDEA

At the pertinent times the IDEA provided in 20 U.S.C. § 1415(e)(4)(B):

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

With respect to representation of parties at an impartial due process hearing, the Act provided in § 1415(d)(1) that any party shall be accorded

> the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.

B. Court Decisions Involving Marilyn Arons

Arons does not hold a law degree. Accordingly, when she began representing parents of learning disabled children in IDEA-mandated impartial hearings before state educational agencies, she described herself as a "lay advocate." In *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir. 1988), Arons challenged a provision in the New Jersey Administrative Code that nonlawyers may not receive a fee for representing a party in administrative proceedings. She argued that she had "done work equal to that of an attorney within the State of New Jersey yet is denied equal pay for that equal work because she is not a member of the New Jersey Bar Association or a graduate of a law school." 842 F.2d at 60. The district court denied relief and the Third Circuit affirmed, reasoning that the provision in § 1415(d)(1) of the IDEA that a party "may be accompanied and advised by counsel *and by individuals with special knowledge or training* " (emphasis added) did not preempt the state administrative rule that only counsel could charge fees for their services. *Id.* at 62. The court of appeals reasoned that "[t]he carefully drawn statutory language [of IDEA] does not authorize these specially qualified individuals to render legal services," also observing that neither the Act nor its legislative history contained provisions "granting fees for representation by lay advocates." *Id.* However, the Third Circuit went on to say:

> That is not to say that plaintiff here may not perform traditional representation functions during

administrative hearings. New Jersey Office of Administrative Law regulations authorize her to do so. As presently drawn, however, those regulations do not allow her to collect a fee for such services. We emphasize, as did the district court, that nothing prevents her from receiving compensation for work done as an expert consultant or witness. Although we appreciate the difficulty of trying to allocate between compensable time spent in consultation and noncompensable time spent in legal representation, the task is not insurmountable. The receipt of consultation fees should eliminate the financial losses Arons claims to have sustained in the course of providing assistance to parents of handicapped children.

* * *

The New Jersey no-fee rule will not frustrate the Act's purpose of providing parents with expert assistance in navigating the administrative process. As we have noted, nothing hinders plaintiff from charging for her expert services in giving testimony, preparing technical reports, consulting with parents, attending hearings, or advising parents about education decisions.

Id. at 62-63.[6]

6. Subsequently the Supreme Court of Delaware adopted the Third Circuit's reasoning in *New Jersey Board of Education* in a different context, affirming a decision of an administrative board

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Presumably guided by the Third Circuit's decision in *New Jersey Board of Education*, Arons no longer describes her participation in IDEA hearings as that of "lay advocate." Her statement of services in the case at bar is captioned "Joseph Murphy Consultation Bill." While the District seems to disparage this change in Arons's self-designation, Donegan Aff. at ¶ 46, I do not attach any weight to it in evaluating the present application.

In two more recent reported cases under the IDEA, district courts asked to direct school districts to pay for Arons's services to prevailing parents have attempted, in the Third Circuit's phrases, the "not insurmountable" task of allocating "between compensable time spent in consultation and noncompensable time spent in legal representation." 842 F.2d at 62. Those cases are *Connors v. Mills*, 34 F. Supp.2d 795 (N.D.N.Y. 1998), and *Borough of Palmyra Board of Education v. R.C.*, No. 97-6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999).

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that Arons and a colleague, Ruth Watson, had engaged in the unauthorized practice of law due to their representation of families of children with disabilities in due process hearings held by Delaware education authorities pursuant to the IDEA. *In re Matter of Marilyn Arons, Ruth Watson, and Parent Information Center of New Jersey, Inc.*, 756 A.2d 867 (S. Ct. Del. 2000). The Delaware court concluded that § 1415(h)(1) of the Act "cannot be interpreted as granting a clear right to lay representation," a conclusion which "renders moot Appellants' claim that the IDEA preempts any state-law proscription against the unauthorized practice of law that might otherwise apply to the activities of such individuals with special knowledge or training in this context." *Id.* at 874.

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In *Connors*, the plaintiff parent objected to the school district's IEP for her learning disabled child, enrolled the child in a private school, and hired Arons to "help her prepare" for due process hearings and to "represent her" in negotiating a number of settlement agreements "relative to the due process hearings." 34 F. Supp.2d at 799. A settlement having been arranged with respect to the district's reimbursement of plaintiff for the private school tuition, "[t]he only matter left to be examined is whether Plaintiff may recoup the cost of hiring Mrs. Arons as her representative at the various due process hearings." *Id.* at 806. The district judge analyzed the IDEA as construed by the Third Circuit in *New Jersey Board of Education*, and concluded that "[i]n the absence of affirmative state action in promulgating regulations that govern the training and conduct of lay advocates, Plaintiff's request for Mrs. Arons's fees pursuant to § 1415(e)(4)(B) must be denied." *Id.* at 808.

However, citing the Third Circuit's observations in *New Jersey Board of Education* quoted *supra*, the court in *Connors* continued:

> That is not to say that Mrs. Arons cannot collect her fees as an educational consultant or as a witness. Thus, Mrs. Arons may recoup all fees incurred in procuring technical reports, attending the hearings, or in advising Mrs. Connors regarding educational problems, the evaluation thereof, and the proper educational placement for D.C.

Plaintiff included in her papers a summary of Arons's services similar in form to that prepared by Arons in the case at bar. Referring to that summary, the court in *Connors* said:

> The total for the above services is $3,000. While this list shows activities Mrs. Arons did in a general sense, it does not break down her services sufficiently to differentiate between those pertaining to legal representation and those pertaining to consultation, advice, or any other compensable activity. As a result, a calculation of fees cannot be done at this time. If Plaintiff wishes, she may submit an itemized fee schedule provided the schedule was produced contemporaneously with Mrs. Arons's services.

Id. (citation omitted). No subsequent decisions in the case are reported.

In *Palmyra* the plaintiffs, parents of a learning disabled child, began administrative proceedings against the local school board, alleging that the board had failed to provide the child with a free appropriate education as required by Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. They included a request that the board reimburse them for tuition incurred at a private school to which plaintiffs had unilaterally placed their son. Throughout the administrative process, the plaintiffs "were represented by Marilyn Arons, their non-attorney representative, who also acted as a consultant to them." 31 IDELR ¶ 3 at 8. The administrative proceeding ended in plaintiffs' favor, the administrative law judge holding that the board had failed to provide the child with an appropriate education and was responsible for past and continuing enrollment and transportation expenses at the private school. The board appealed that decision to the district court, which granted plaintiffs injunctive relief, and then

endorsed a settlement of the board's continuing obligations. The parties reserved on the issues of attorney's fees and expenses. The district court's opinion resolved those issues. The opinion refers to the plaintiff parents as "the Cs" and their child as "F.C."[7]

The *Palmyra* plaintiffs' entitlement to recover Arons's charges from the school board turned upon the fee-shifting provisions of § 504a(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), which provide that

> [i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Although the case at bar is governed by the IDEA, not the Rehabilitation Act, the *Palmyra* court's resolution of the issue is instructive because, as that court noted, "Section 504's fee provision is virtually identical to that in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3)(B)." 31 IDELR ¶ 3 at 11. Accordingly the district judge in *Palmyra* derived guidance from cases which "have consistently interpreted the phrase 'reasonable attorney's fees as part of the costs' in the IDEA to include reimbursement for fees for expert witnesses and other consultants retained in connection with the case." *Id.* Conversely, in the case at bar involving the District's liability under the IDEA to pay

7. The caption of the opinion as reported refers to the child as both "R.C." and "F.C.", but "F.C." is the reference used throughout the text.

for Arons's services, I may derive guidance from *Palmyra*, a case adjudicating a school board's liability under the Rehabilitation Act to pay for the same sort of services furnished by Arons.

The district court in *Palmyra* quoted the Third Circuit's holding in *New Jersey State Board of Education* that Arons (and by logical extension parents hiring Arons) could not recover fees for Arons's "traditional representation functions during administrative hearings," but that "nothing hinders [Arons] from charging for her expert services in giving testimony, preparing technical reports, consulting with parents, attending hearings, or advising parents about educational decisions." *Palmyra*, 31 IDELR ¶ 3 at 11 (quoting *New Jersey State Board of Education*, 842 F.2d at 63).

Applying those principles to the facts of the case, the district court in *Palmyra* concluded that of the 172.5 itemized hours Arons devoted to the family's situation between 1995 and 1998, "approximately half of these hours were justified and reasonable hours spent by this consultant on the type of work for which the Third Circuit indicated she should be compensated." 31 IDELR ¶ 3 at 12. Those compensable hours were devoted to "preparing for and attending Section 504 meetings, conducting research (including conversation with the Cs) to form an educational plan for F.C., talking with other experts about proper education for F.C., and obtaining placement for F.C. at the Hill Top Preparatory School." *Id.*[8]

8. The Hill Top Preparatory School was the private school in which the plaintiff parents unilaterally enrolled their son after deciding that the defendant school board's IEP for him was unsatisfactory.

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But the court continued: "Certain of the 172.5 hours listed, however, are not expenses reasonably incurred by an educational consultant for which Palmyra [the school board] should be held liable." Those noncompensable services included:

(a) Time Arons spent "providing therapy to the Cs." Her certification recited that "the 21 hours she spent in the car with the Cs traveling back and forth to Mercerville for the OAL hearing in 1996 were spent providing 'parent consultation, support, explanation and services' to deal with the Cs' 'distress and upset' and 'anxiety and pain.'" Specifically, Arons stated in her certification that she provided consultation regarding "the two other children in the family and strategies as to how to complete the process needed in order to provide [F.C.] with the essential services that he required and was denied. These strategies were not legal in nature, but addressed the psychodynamics between parents and children at times of stress, anger and frustration." The district court concluded that "[w]ithout more specific details as to how much of these 21 hours were spent discussing F.C., the other children, and family stress," the court could allow only 25% of that time, or 5.25 hours, as properly chargeable to the school board. *Id.*

(b) The court disallowed entirely "[o]ther examples of time spent providing therapy or counseling," specifically, in telephone or in-person conferences which Arons's certification indicated "were devoted to discussing parent coping mechanisms, the Cs' other children, and other therapeutic topics." *Id.*

(c) The court refused to direct the school board to pay for the four hours Arons spent attending a workshop about students with language disorders, reasoning that the workshop "constituted professional development for Ms. Arons, and professional development, like overhead, is not recoverable from Palmyra as part of attorneys' fees and costs." *Id.*

(d) The court held that the Cs could not recover from the school board for Arons's 38.5 hours in travel time to meetings with the Cs" over several years. *Id.*

(e) The court, while acknowledging that "the Cs can recover for Ms. Arons's time testifying at a hearing or preparing technical reports," her time spent rendering legal services, "such as preparing direct and cross examinations for the OAL hearing" and "discussing the availability of legal representation by others with the Cs," were not compensable by the school board, and deducted a number of hours from the claim. *Id.*

The district court in *Palmyra* concluded this section of its opinion with these sensible observations:

> This is not to say that Ms. Arons cannot recover fees at all for time she spent traveling, counseling, or helping the Cs obtain legal representation. She is entitled to receive these costs from the Cs themselves. This Court has simply determined that it is not appropriate, under the attorneys' fees and costs provision of the Rehabilitation Act, to require Palmyra to pay those costs because they

> are not reasonable expert consultation services justified by the Cs' ultimate success before the ALJ. In total, the Cs are entitled to be reimbursed for the portion of Ms. Arons' bill representing a total of 82 hours of work."

Id. Thus the court concluded that 47.5% of the charges for Arons's services were compensable by the school board under the fee-shifting provisions of the Rehabilitation Act.

The *Palmyra* court also held that Arons's claimed hourly rate of $200 (the same rate claimed in the case at bar) "is a reasonable fee for work by someone of Ms. Arons' caliber and experience, consistent with her customary hourly fee for such services." 31 IDELR ¶ 3 at 13.

C. The Liability of the Arlington School District for the Cost of the Services Rendered by Marilyn Arons to the Murphy Family

I am in general agreement with the analyses of the district courts in *Connors* and *Palmyra*. It follows, for the reasons stated *infra*, that if the present plaintiffs' claim against the District based on Arons's services is allowable at all, that claim is subject to a substantial discount.

However, the District raises a threshold objection to the claim in its entirety. The District argues that the claim for Arons's services should be denied because "[n]either the parents nor Ms. Arons have provided the Court with contemporaneous records to support this part of their application." Brief at 11-12. If Arons was an attorney and

plaintiffs were attempting to recover for her fees, the District's objection would be well taken. *New York Association for Retarded Children v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983), established the rule that "[h]ereafter, any attorney—whether a private practitioner or an employee of a nonprofit law office—who applies for court-ordered compensation in this Circuit for work done after the date of this opinion must document the application with contemporaneous time records." Arons's "certifications" of services are not "contemporaneous time records"; plaintiffs do not contend otherwise. But the Second Circuit has never extended the *Carey* rule to the compensation of experts or consultants, and I regard Arons's certifications and descriptions of her services as sufficient to allow the claim to be at least considered (although subject to the uncertainties discussed *infra*).[9]

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9. The District also notes *en passant* that "[t]here is conflicting authority about whether or not expert fees are recoverable under IDEA at all," Brief at 10, citing cases from a number of jurisdictions. But district courts in this circuit uniformly hold that such fees are recoverable under the fee-shifting provisions of the Act. As discussed in text, *Connors* held that in a parent's *pro se* action brought under the IDEA, the fees of *Arons herself* were recoverable from the school district to the extent that her services pertained "to consultation, advice, or other compensable activity." 34 F. Supp.2d at 808. Judge McMahon's thoughtful opinion in *BD v. DeBuono*, 177 F. Supp.2d 201 (S.D.N.Y. 2001), holds that "Congress intended for expert fees to be reimbursable as attorneys' fees in cases brought to enforce the rights guaranteed by IDEA," *id.* at 208. Judge Chin reached the same conclusion in another IDEA case, *R.E. v. New York City Board of Education, District 2*, No. 02 Civ. 1067, 2003 U.S. Dist. LEXIS 58 (S.D.N.Y. Jan. 6, 2003), at *8-9 ("Although expert fees are usually not reimbursable as part of taxable costs awarded to a prevailing party, they are reimbursable under fee-shifting statutes.").

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The substantive argument that the District makes is that not all Arons's claimed hours are compensable under the IDEA's fee-shifting provision. That argument requires careful analysis because, as the cases cited *supra* demonstrate, a prevailing parent in a suit brought under the Act is not automatically entitled to the full amount of an educational consultant's charges. To be compensable under the Act, the charges must have been incurred "in . . . an action or proceeding brought" under the Act. 20 U.S.C. § 1415(e)(4)(B). While "prevailing plaintiffs may obtain costs and attorney's fees for pre-hearing settlements pursuant to § 1415(e)(4), ... [t]he 'trigger point' for attorney's fees under the IDEA is generally a request for an impartial hearing," *Shanahan v. Board of Education of the Jamesville- Dewitt School District*, 953 F. Supp. 440, 444 (N.D.N.Y. 1997). The same "trigger point" logically applies to consultants' fees claimed as part of the costs of an action brought under the Act. It is readily apparent, and the cited cases demonstrate, that an educational consultant such as Arons may render services to a family such as the Murphys which, while valuable and helpful, do not fall within the ambit of compensable costs under the IDEA.

In the case at bar, by a letter dated September 3, 1998, plaintiffs requested an impartial hearing "to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement of their son in a private school along with costs associated with private speech therapy." Donegan Aff. at ¶ 10. That date establishes the starting line of the administrative/litigation process in which plaintiffs prevailed, thereby becoming entitled to the statutory award of fees. I will not charge the District for any services by Arons to the plaintiffs prior to that date.

Appendix B

The date establishing the finish line of the process is March 1, 2000, which is the date of this Court's ruling in plaintiffs' favor on the merits of their contentions. That ruling turned the plaintiffs into "prevailing parties" under the IDEA fee-shifting provision. The litigation had been resolved in their favor. It necessarily follows that services rendered by Arons to plaintiffs subsequent to that date cannot be characterized as "part of the costs" of the "action or proceeding," those being the defining phrases of the IDEA fee-shifting provision.[10]

Within those temporal parameters, the first services rendered by Arons that might be compensable occurred on September 23, 1998, and the last on September 4, 1999. I use the phrase "might be compensable" because, in the words of the district court in *Connors*, it is necessary "to differentiate between those [services] pertaining to legal representation and those pertaining to consultation, advice or other compensable activity," the former being noncompensable under the Act and the latter compensable. During this period of time Arons rendered 43 1/4 hours of services to the plaintiffs and to their son. As in *Connors*, the descriptions of services Arons includes in her certification

10. To be sure, plaintiffs would have been divested of their prevailing party status if the Second Circuit had reversed this Court's ruling in their favor. But the Second Circuit affirmed that ruling in an opinion dated July 16, 2002. I do not use that later date as the demarcation line for Arons's services compensable under the IDEA fee-shifting provision because the plaintiffs were represented by counsel on the appeal and there is no indication in Arons's certifications of services that she rendered consultation, advice or other compensable activity in connection with the appeal.

are not sufficiently detailed to allow a differentiation to be performed with certainty. But the descriptions during this period of time show clearly enough that Arons was furnishing consulting services to plaintiffs in preparation for the impartial hearing before the IRO. Those services are compensable. I reject the District's contentions that some of them are not. The District questions 4 hours Arons spent on November 8, 1998 reviewing a scholarly article on learning disabilities. As noted, the district court in *Palmyra* disallowed 4 hours Arons spent attending a workshop, reasoning that this constituted "professional development" for Arons, not compensable under a fee-shifting statute. But Arons explains in her supplemental certification at ¶ 9 that the article in question was given to her by plaintiff Pearl Murphy, who "asked me to read it and explain it to her. I did." The circumstances are quite different from those in *Palmyra*, and these services are compensable as pertaining to consultation or advice.

The District also objects to plaintiffs' "request for reimbursement for Ms. Arons's development of questions for witnesses at the impartial hearings." Donegan Aff. at ¶ 42. At first blush these activities as described by Arons would appear to reflect noncompensable legal representation; *see, e.g.*, the description of 5 hours devoted on November 11, 1998 to "Development of questions for Jennifer Jenson; Review of Ansley report and recommendations; Development of Ansley questions." However, Arons explains in her supplemental certification at ¶ 3:

> Relative to the questions asked at hearings, it is my experience that special educators write those

> questions for the attornies [*sic*] involved because attornies do not understand the implications of diagnostic reports or the contents of IEPs. During the Murphy hearings, I observed Mr. Schiro [counsel for the District] to ask the members of the Arlington CSE about the meanings of test results, and the staff's development of questions for him to ask about these and related matters.

This explanation is entirely plausible, and places such services in the compensable categories of consultation and advice, rather than the noncompensable category of legal representation. I will draw an analogy from my own practice at the bar. I tried cases involving collisions of ships at sea. If radar was involved (as it almost always was), each party in the litigation retained a radar expert to consult and advise with respect to the radar-related questions the attorneys should ask on direct and cross-examination. Given the technical complexities of the developing radar technology, it would have been folly for admiralty lawyers to do anything else: but I never thought of my radar expert as the client's legal representative; I was the legal representative; the radar expert was my consultant and much-appreciated adviser.[11]

I am unable to discern any portion of the 43 1/4 hours under consideration that clearly fall within the noncompensable category. Accordingly I allow them all, at Arons's claimed hourly rate of $200. While the District

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11. In reaching this particular conclusion, I disagree with the district court in *Palmyra*, which as noted *supra* disallowed Arons's time spent in "preparing direct and cross examination for the OAL hearing."

proclaims that "how Ms. Arons established this market value is a mystery," Donegan Aff. at ¶ 53, the mystery would have been solved if Donegan had read the *Palmyra* decision, where the district court approved that rate for Arons for reasons that I find persuasive and adopt.

It follows that with respect to the services of Marilyn Arons, plaintiffs are entitled to recover from the District the amount of $8,650 (43 1/4 hours x $200 per hour).

Plaintiffs and Arons may well be disappointed by that amount; Arons devoted 146.75 hours to the welfare of plaintiffs' son, and the claim against the District was for $29,350. In that regard, two additional points may usefully be made.

Explaining the amount of time she spent on the Murphy family's situation, Arons says in her supplemental certification at ¶ 8 that "[t]he Murphy case had three hearings, one after the other. Often there were layers of litigation occurring at the same time, impartial hearing, Supreme Court, Appellate Court, and Federal Court ." The record in the case in this Federal Court does not fully reveal the nature or extent of litigation in other courts; but obviously this Court's power to award costs to plaintiffs is limited to costs incurred in this case: "layers of litigation" in other courts and costs incurred in connection with them (including fees for Arons's services) have no relevance to the present application.

Second, nothing I have said in this opinion or the result I have reached should be regarded as a denigration of Marilyn Arons's abilities or the devoted services she rendered to the

Murphy family. I have no doubt that those services were worth over $29,000. But my responsibility is to interpret and apply a fee-shifting statute, awarding plaintiffs what the law allows while protecting the finite resources of the Arlington Central School District budget from expenditures the law does not require. Arons's agreement with the Murphys to accept as compensation only what the Court allowed may be viewed as compassionate, but it forms no basis for the Court to depart from what the law does in fact allow.

D. The Liability of the Arlington School District for the Cost of Mileage Incurred by Plaintiff Pearl Murphy

Plaintiff Pearl Murphy claims a total of $7,847.14 in mileage costs. This total is based upon a mileage rate of 36.5 cents per mile, with Mrs. Murphy using the family car. Of that amount, $6,161.22 represents mileage incurred in driving Arons to and from the latter's home in New Jersey; Arons is not a licensed driver. The balance represents travel to and from the offices of several physicians and speech therapists who were treating Joseph Murphy.

I am not able to allow any of these claims under the Act's fee-shifting provision. Plaintiffs had every right to retain an out-of-state consultant who did not drive, but a mileage cost for use of the plaintiffs' car does not fit within even an expanded concept of "attorneys' fees as part of the costs."[12] Nor may the District be required under the Act to reimburse plaintiffs for mileage incurred in taking Joseph to private physicians and therapists.

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12. Arguably mileage might be allowable if Arons drove her car to plaintiffs' residence for the purpose of rendering services compensable under the Act and charged plaintiffs for that mileage as part of her invoice. But that is not this case.

Appendix B

IV. CONCLUSION

For the reasons stated, plaintiffs Pearl Murphy and Theodore Murphy are entitled to recover from defendant Arlington Central School Board of Education the sum of $8,650. The balance of plaintiffs' application for fees and costs in this action is denied.

If the District does not pay this amount promptly, plaintiffs may ask this Court in writing (with a copy to counsel for the District) to enter judgment on this amount, so that post-judgment interest will begin to accrue. There is no occasion to consider pre-judgment interest, because plaintiffs are not out of pocket with respect to the allowed amount.

It is SO ORDERED.

Dated: New York, New York
July 22, 2003

s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
SENIOR UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 30 2005
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(2)

No. 05-18

In The

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,

v.

PEARL AND THEODORE MURPHY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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September 1, 2005

BRIEF IN OPPOSITION

Respondents Pearl and Theodore Murphy oppose the petition for a writ of certiorari, which presents two questions, neither of which warrants review. As to the first question, respondents agree that there is an emerging circuit split on whether expert fees are available under the Individuals with Disabilities Education Act's provision authorizing an award of "costs." But this split is not sufficiently mature to warrant this Court's attention at this time. Petitioner also seeks review of the Second Circuit's affirmance of the partial expert fee awarded by the district court in this case. Petitioner claims that the lower courts have approved an "expert" fee for what it contends are "legal" services. But the Second Circuit did not hold that plaintiffs can obtain "legal" fees for the services of non-lawyer experts. Indeed, it held just the opposite. Petitioners' claim is only that the Second Circuit erred in drawing the line between legal and expert services. This claim, which is highly fact-bound, does not merit review. The petition should be denied.

1. Petitioner asks this Court to review the Second Circuit's decision that a prevailing party may recover expert fees under the fee-shifting provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3)(B). That provision states that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is a prevailing party." *Id.* After a thorough analysis of the text of IDEA's fee-shifting provision, this Court's precedent, IDEA's legislative history, and the statute's remedial purpose, the Second Circuit concluded that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Murphy v. Arlington Central Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005).

In reaching its conclusion, the Second Circuit first examined this Court's rulings in *Crawford Fitting Co. v. J.T.*

Gibbons, Inc., 482 U.S. 437 (1987), and *West Virginia Univ. Hospital v. Casey*, 499 U.S. 83 (1991). Taken together, the decisions establish that, although the term "costs" is not self-defining, unless Congress specifies otherwise, a statutory authorization for costs does not authorize the payment of expert witness fees. *Murphy*, 402 F.3d at 336. The Second Circuit noted that, in contrast to the statutes construed in those cases, Congress, in IDEA's legislative history, left no doubt that it intended expert fees to be included within the term "costs" under IDEA. *Id.* The court also pointed out that *Casey* looked to IDEA's legislative history to differentiate IDEA from 42 U.S.C. § 1988, where there was no indication that Congress intended the word "costs" to include expert witness fees. *Casey*, 499 U.S. at 92 n.5. The Second Circuit also observed that "[e]xpert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education." *Murphy*, 402 F.3d at 338. The availability of expert fees would thus be in keeping with IDEA's remedial purpose. *Id.*

In ruling that IDEA authorizes the award of expert fees as part of costs, the Second Circuit joined the Third Circuit and the majority of district courts that have considered the issue. *See Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1988); *see, e.g., Pazik v. Gateway Regional Sch. Dist.*, 130 F. Supp. 2d 217, 220 (D. Mass. 2001); *Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 870-72 (S.D. Tex. 2003), *rev'd in part on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *Verginia McC. v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex 1995); and *Gross v. Perrysburg Exempted Village Sch. Dist.*, 306 F. Supp. 2d 726, 738-39 (N.D. Ohio 2004).

To be sure, three other circuits – the Seventh, Eighth, and, now, D.C. Circuits – have reached the contrary conclusion. *Neosho R-V. Sch. Dist. v. Clark ex rel. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003); *T.D. v. LaGrange Sch. Dist. No.*

102, 349 F.3d 469, 482 (7th Cir. 2003); *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005). But only the D.C. Circuit's opinion sets forth any detailed analysis to support its conclusion, and that decision was reached over a vigorous dissent by Judge Rogers, who argued that the court should follow the Second Circuit's approach in *Murphy*.[1] Thus, although a split has emerged among the circuits, fewer than half of the circuits have yet considered the question, and only two circuits have written opinions that address the question in any depth. There is no need for the Court to resolve this question at this time. The Court should deny the petition on the first question presented.

2. Petitioner also seeks review of the Second Circuit's affirmance of the partial expert fee awarded by the district court in this case. Petitioner claims that the lower courts have approved an "expert" fee for what it contends are "legal" services. This claim, which is highly fact-bound, does not merit review.

In IDEA due process proceedings, parents and students with disabilities have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. § 1415(h)(1). Plaintiffs' expert, Ms. Marilyn Arons, is an educational consultant who advises families like the Murphys on their children's disabilities and the educational strategies that might help their children make progress in school. Ms. Arons also assists families in navigating IDEA's complex procedures. The district court ruled that the Murphys were entitled to recover only $8,650 of the $29,350 in expert fees requested for Ms. Arons' services, and the Second Circuit affirmed that ruling. In so doing, the Sec-

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[1] A petition for rehearing en banc in *Goldring* was filed with the D.C. Circuit on August 25, 2005, and thus there is a possibility that the D.C. Circuit will reconsider the panel's split ruling in that case.

ond Circuit adopted the Third Circuit's approach in *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (1988) (involving the same expert) namely, that experts who assist families may not be awarded costs for "legal" work, but may recover costs for expert consultations. *Murphy*, 402 F.3d at 338-39. Petitioner asks this Court to review the district court's finding, affirmed by the Second Circuit, that Ms. Arons should be awarded expert fees for the non-legal, expert consulting services she performed on the Murphys' behalf. No other court has addressed this issue, and the line drawn by the Second and Third Circuits is eminently reasonable. This question does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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BRIEF IN REPLY

I. The Second Circuit erred in holding that the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA.

Expert witness fees are not recoverable under the Individuals's with Disabilities Education Act ("IDEA"), which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. *See West Vir. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (interpreting nearly identical language in the former version of 42 U.S.C. § 1988 not to include expert fees), *superseded by statute*, 42 U.S.C. § 1988(c) (2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (finding no authorization in IDEA for expert witness fees); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003) (finding nothing in the plain language of IDEA authorizes recovery of expert witness fees). "The correct decision," on whether or not the IDEA provides for recovery of expert fees, "does not seem difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in Section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees." *Goldring v. District of Columbia*, 416 F.3d 70, 73 (D.C. Cir. 2005).

Contrary to the parents' claim, there is an equal amount of district court precedent denying recovery of expert fees under the IDEA, *see Mayo v. Booker*, 56 F. Supp. 2d 597, 599 (D. Md. 1999) (holding that expert witness fees not available under IDEA); *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 659 (D.N.C. 1998) (determining that Section 1415 "does not provide for an award of expert

witness fees"); *Shanahan v. Board of Educ. of the Jamesville - DeWitt Sch. Dist.*, 953 F. Supp. 440, 446 n.9 (N.D.N.Y. 1997) (holding that the IDEA provided no authority to courts to award expert fees as part of attorneys' fees and costs); *Cynthia K. v. Board of Educ. of Lincoln-Way High Sch. Dist.*, No. 95 Civ. 7172, 1996 WL 164381 at *2 (N.D. Ill. Apr. 1, 1996) (finding that expert fees "are simply not recoverable" under the IDEA), as there is allowing for such recovery, *see Board of Educ. of Frederick County v. I.S.*, 358 F. Supp. 2d 462, 473 (D. Md. 2005); *Gross v. Perrysburg Exempted Village Sch. Dist.*, 306 F. Supp. 2d 726, 738-739 (N.D. Ohio 2004); *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 207-208 (S.D.N.Y. 2001); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 220 (D. Mass. 2001); *Mr. J. v. Board of Educ.*, 98 F. Supp. 2d 226, 242-243 (D. Conn. 2000); *Verginia McC. v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995).

A. The Court should exercise it judicial discretion and grant certiorari in this matter given the pronounced conflict between the circuit courts of appeal on the recovery of expert fees under the IDEA.

As a threshold matter, the issue of whether or not expert fees are recoverable as costs under the attorneys' fees shifting provision of the IDEA is ripe for review by the Court at this time. Supreme Court Rule 10(a) provides that the Court will entertain appeals where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Here, the Second Circuit's holding that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions," *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005), directly conflicts with the holdings of three other circuits, *see Goldring*, 416 F.3d at 73

(prevailing party under IDEA cannot recover expert fees); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (same); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003) (same). While the parents state that the District's petition for writ of certiorari should be denied because "fewer than half the circuits have yet considered the question [of expert fees under the IDEA]," *see* Res. Br. at 3, this proposed test is not recognized by statue, court rule or case law.

B. The IDEA contains no explicit statutory authority for the recovery of expert fees.

The IDEA's fee-shifting provision states that "in any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorney's fees as part of the costs* to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B) (emphasis added). That the crucial statutory language -- "reasonable attorneys' fees as part of the costs," *id.* -- fails to allow a prevailing party to shift his expert fees flows directly from the cannon of statutory construction known as *expressio unius est exclusio alterius*, to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

C. The Court's decision in Casey does not endorse an elevation of legislative history over the absence of explicit statutory authority for the recovery of expert fees under the IDEA.

The Second Circuit erred in construing dicta in *Casey*, which commented on some of the legislative history behind the IDEA's attorneys' fees provision, *see Casey*, 499 U.S. at

91 n.5,[1] as authority to depart from the text of the statute and conclude that Congress intended to allow prevailing parties to recover the costs of experts, *see Murphy*, 402 F.3d at 337.

In *Casey*, the Court addressed whether an earlier version of 42 U.S.C. § 1988 provided explicit statutory authorization for the recovery of expert fees. *See Casey*, 499 U.S. at 87. The Court concluded that it did not. *See id.* at 97. "Because Section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift expert fees, we cannot but conclude that section 1415 does likewise." *Goldring*, 416 F.3d at 74.

The *Casey* Court's footnote reference to an IDEA Conference Report, *see Casey*, 499 U.S. at 91 n.5, does not authorize a departure from the ordinary meaning of the term "costs" in the IDEA, *see Goldring*, 416 F.3d at 75. "If the [*Casey*] Court had found this one sentence of legislative

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1. The Court's footnote states in full:

> WVUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." See H.R.Conf.Rep. No. 99-687, p. 5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

Casey, 499 U.S. at 91 n.5.

history compelling, it would have included section 1415 in its catalogue of statutes authorizing a prevailing party to shift attorneys' fees as well as expert fees." *See id.* at 75-76.

D. The Second Circuit erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

The Second Circuit's reliance on legislative history to conclude that expert fees are recoverable under the IDEA, *see Murphy*, 402 F.3d 336-37, is misplaced as "a sentence in a conference report cannot rewrite unambiguous statutory text, particularly text with a Supreme Court-tested and -approved meaning," *see Goldring*, 416 F.3d at 75. As Justice Oliver Wendell Holmes once quipped: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." *See* Oliver Wendell Holmes, *Collected Legal Papers* at 207 (1920). Justice Holmes also stated, "We do not inquire what the legislature meant; we ask only what the statute means." *See id.*

Likewise, Congress's inaction with respect to section 1415 following the Court's decision in *Casey* is not probative to the issue of recovery of expert fees under the IDEA. *Compare Goldring*, 416 F.3d at 76 *with Murphy*, 402 F.3d at 337. The Second Circuit erred in reasoning "that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." *See Murphy*, 402 F.3d at 337. The D.C. Circuit's reasoning is more persuasive: "given that the *Casey* Court merely labeled the Conference

Report an 'apparent effort' by the congressional committee and did not number section 1415 among the statutes authorizing the recovery of attorneys' fees *and* expert fees, we are unwilling to infer from Congress' failure after *Casey* to amend section 1415 that the Congress believed the Supreme Court had considered the text of to have been altered by the Conference Report." *See Goldring*, 416 F.3d at 76 (emphasis in original). The Second Circuit's inferential path, that Congress' failure after *Casey* to amend section 1415 reflects Congress' belief that the Supreme Court had considered the IDEA's text to have been altered by the Conference Report, *see Murphy*, 402 F.3d at 337, "leads to where reason goes to die," *see Goldring*, 416 F.3d at 76.

II. The Circuit Court erred permitting, under the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), the recovery of a non-testimonial expert assisting parents in an impartial due process hearing without the guidance of a licensed attorney.

Contrary to the parents' assertion, the dearth of evidence presented to the lower courts of Ms. Arons' alleged expertise and expert services rendered to the parents is not a "highly fact-bound" claim. *See* Res. Br. at 3. It is undisputed that Ms. Arons is not licensed to practice law in New York State or any other. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 0204, 2003 WL 21694398, at *4 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332 (2d Cir. 2005).

From Ms. Arons' certifications and the record of the impartial hearing below, it is also undisputed that, notwithstanding the absence of a license to practice law, Ms. Arons systematically performed tasks at the hearing which one can only be characterized as the practice of law: she accepted the parents' case, she set a fee, she gave legal advice, she planned legal strategy, she prepared examination

questions of witnesses, she took testimony from witnesses, she made and responded to motions and objections and she prepared post-hearing briefs (A-11-A-18, A-45-A-46). *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2002).[2]

It is also undisputed that no contemporaneous time records were produced to substantiate Ms. Arons' claim for "expert" fees. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398, at * 8 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332, 339 (2d Cir. 2005). Neither the district court's reduced award to Ms. Arons, see *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398, at * 8 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332, 339 (2d Cir. 2005), nor the Second Circuit's prospective holding that a plaintiff's application for fees for experts or consultants who perform services in IDEA actions must be accompanied by contemporaneous time records, *see Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 339 (2d Cir. 2005), corrects the inequity of an award of "expert" fees to an unlicensed individual performing legal services disguised as expert services. *See Arons v. New Jersey State Bd. of Educ.*, No. 85 Civ. 209, 1987 WL 10808, at *4 (D.N.J. May 12, 1987), *aff'd*, 842 F.2d 58, 62-63 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988). To permit recovery of lay legal services

2. Two of the witnesses that Ms. Arons' elicited testimony from at the impartial hearing were experts hired by the parents: a neuropsychologist and a speech/language pathologist. *See Application of the Board of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (N.Y. State Review Officer Dec. 14, 1999). Interestingly, in the parents' application to the district court to recover expert fees under the IDEA based on their success at the hearing, no evaluation or appearance charges for either of the parents' actual experts were included (A-11-A-18,A-45-A-46). *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2002)).

cloaked as "expert" services opens parents of disabled students to frivolous lawsuits and potential financial ruin. *See Arons v. State of New York*, No. 04 Civ. 0004, 2004 WL 1124669, at *1-3 (S.D.N.Y. May 20, 2004) (dismissing Ms. Arons' federal lawsuits against parents of disabled students).

CONCLUSION

The Court should invoke its power to review this issue. To avoid certain confusion, not only in the Second Circuit, but throughout the Circuits, the Court must clarify for civil rights litigants in IDEA actions whether or not the Court intended for its opinion in *Casey* to elevate some of the IDEA's legislative history over the explicit wording of the statute and permit recovery of expert fees in IDEA actions.

Respectfully submitted,

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